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TABLE OF CONTENTS.

ARTICLES.

INDEX-DIGEST.

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES; and in heavy-faced italics to CRITICISMS OF ARTICLES.

A

B

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES; and in heavy-faced italics to CRITICISMS OF ARTICLES.

C

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES; and in heavy-faced italics to CRITICISMS OF ARTICLES.

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES; and in heavy-faced italics to CRITICISMS OF ARTICLES.

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES and in heavy-faced italics to CRITICISMS OF ARTICLES.

D

E

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES; and in heavy-faced italics to CRITICISMS OF ARTICLES.

F

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES; and in heavy-faced italics to CRITICISMS OF ARTICLES.

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES; and in heavy-faced italics to CRITICISMS OF ARTICLES.

J

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES; and in heavy-faced italics to CRITICISMS OF ARTICLES.

L

M

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES; and in heavy-faced italics to CRITICISMS OF ARTICLES.

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES; and in heavy-faced italics to CRITICISMS OF ARTICLES.

Q

R

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES; and in heavy-faced italics to CRITICISMS OF ARTICLES.

S

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES; and in heavy-faced italics to CRITICISMS OF ARTICLES.

T

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES; and in heavy-faced italics to CRITICISMS OF ARTICLES.

U

V

W

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; in italicized type to ARTICLES; and in heavy-faced italics to CRITICISMS OF ARTICLES.

BOOK REVIEWS.

TABLE OF CASES.

References in heavy-faced type are to NOTES; all others are to RECENT CASES. Citations to decisions which were noticed before their appearance in any regular report have been supplied wherever possible.

INDEX TO LEADING LEGAL ARTICLES.

OCTOBER, 1903 – MAY, 1904.

References in heavy-faced type are to editorial comment in the REVIEW.

Joint Owners of a Patent, Rights of. *Dwight B. Cheever.* 2 Mich. L. Rev. 446.
Joint Stock Corporations Law. *Joseph Bawden.* Suggesting a national incorporation law. 3 Can. L. Rev. 147.
Judges, Election of Federal. *Frederick Bausman.* A reply to a previous article which advocated popular election. 37 Am. L. Rev. 886.
Judges to Grand Juries, The Relation of. *J. B. Mackenzie.* 40 Can. L. J. 255.
Judicial History of Individual Liberty. *Van Vechten Veeder.* 16 Green Bag 101, 177.
Judicial Power of the Commonwealth. *T. R. Bavin.* 1 Commonwealth L. Rev. 49.
Judicial Salaries Law in Pennsylvania. *Luther E. Hewitt.* 42 Am. L. Reg. N. S. 653.
Judiciary under the Constitutions of the United States and of Australia, The Supremacy of the. *A. Inglis Clark.* 17 HARV. L. REV. 1.
Jurisdiction of Courts, Legality of Contracts Affecting the. *Glenda Burke Slaymaker.* 58 Central L. J. 64.
Jurisdiction over Foreign Ships in Territorial Waters. *Charles Noble Gregory.* 2 Mich L. Rev. 333.
Jurisdiction over State Canals, Admiralty. *Anon.* 58 Central L. J. 21.
Jurisprudence and of the Law, The Nature of. A Study in Applied Logic. *George H. Smith.* 38 Am. L. Rev. 68.
Jurisprudence, The History of Comparative. *Sir Frederick Pollock.* 11 J. of the Soc. of Comp. Legislation, N. S. (London) 74.
Jury, The Civil. *A. Caperton Braxton.* 38 Am. L. Rev. 220.
Jury System, French. *Simeon E. Baldwin.* 2 Mich. L. Rev. 597.
Justice of the Peace. *Anon.* A plea for the retention of the office in the judicial system. 1 North Carolina J. of L. 157.
Justices Equally Divided in Opinion. *Anon.* Discussing the courses open to justices in such a case. 68 Justice of P. 182.
Labour, Newspapers and. *Frank S. Hodgins.* Discussing interim injunctions against publishing notices of strikes containing warnings to laborers to keep away. 24 Can. L. T. 33.
Labour Rights, Principle and Limitations of. *Frank S. Hodgins.* 24 Can. L. T. 91.
Landlord and Tenant. *R. Tomlinson.* Discussing Natal law. 2 Nat. L. Quart. 181.
Land Registration, Court of. *Charles Thornton Davis.* 13 Yale L. J. 182.
Land Titles Act, The. *Anon.* Discussing the expense of registering titles under the recent Canadian Act. 39 Can. L. J. 724.
Land Transfer Acts System in England, The Breakdown of the. *J. E. Hogg.* 20 L. Quart. Rev. 74.
Law and Reasonableness. *Le Baron B. Colt.* Discussing the chief modes by which our law has progressed towards ideal justice. 7 Law Notes (N. Y.) 148.
Law of Reason, The. *Sir Frederick Pollock.* 2 Mich. L. Rev. 159.
Law Reporting: A Reporter's View. *Frank Evans.* 20 L. Quart. Rev. 88.
Laws and Law Making. *Henry Hilton Brown.* 29 Law Mag. & Rev. 8.
Law Schools and the Teaching of Law, American. *George L. Reinhard.* 16 Green Bag 165.
Law's Delay, The. *John F. Baker.* Detailed suggestions to the commissioners appointed by the governor of New York to investigate the delays and expenses in the administration of justice. 65 Albany L. J. 372.
Law's Iniquities, One of the. *H. N. G.* Commenting upon the rule that a mistake of law is no excuse in bigamy cases. 7 Law Notes (N. Y.) 226.
Lease, Covenant for Quiet Enjoyment in a. *Charles Thwaites.* 26 Law Stud. J. 30.
Leaseholds by Personal Representatives, Sales of. *Anon.* Discussing the length of time within which the right of sale may be exercised. 38 Ir. L. T. 135.
Legislative Reform, Trade Unionism and. *D. R. Chalmers-Hunt.* 11 J. of the Soc. of Comp. Legislation, N. S. (London) 161. See p. 145.
Letters in Connection with Articles of Commerce, Numerals and. *Bernard C. Steiner.* Discussing trade-mark protection. 13 Yale L. J. 140.
Liens on Securities Pledged to Them by Brokers, Bankers'. *Charles M. Holt.* Discussing Lord Sheffield *v.* London Joint Stock Bank, 13 A. C. 333. 3 Can. L. Rev. 144.
Life, Birth, and Live-Birth. *Stanley B. Atkinson.* 20 L. Quart. Rev. 134. See p. 589.
Life Insurance — Effect of Incontestable Clause in Case of Suicide. *Anon.* 58 Central L. J. 128.
Life Insurance for Non-Payment of Premium, Forfeiture of. *Charles W. Tillett.* 1 North Carolina J. of L. 67.
Life Insurance Policies to Persons Having no Insurable Interest in the Life of the Insured, Validity of Assignments of. *James T. Ford.* 58 Central L. J. 184. See p. 502.
Litigation and Costs, The Trend of. *Wolf Fink.* Discussing costs in Australia. 1 Commonwealth L. Rev. 59.
Look and Listen before Attempting to Cross Railroad Tracks as Sought to be Applied to Urban Street Railways, Limitations of the Rule Requiring Travellers and Others to Stop. *Blackburn Esterline.* 58 Central L. J. 222.

Newspapers and Labour. *Frank S. Hodgins.* Discussing *interim* injunctions against publishing notices of strikes containing warnings to laborers to keep away. 24 Can. L. T. 33.

New Trial and Venire Facias de Novo: A Distinction. *Murray Allen.* 1 North Carolina J. of L. 171.

New York Anti-Trust Act, The. *Thaddeus D. Kenneson.* Arguing that the only effect of the Act is to make illegal those contracts which before were unenforceable on grounds of public policy. 4 Columbia L. Rev. 83.

New York Code of Evidence, A. Part II. *David Dudley Field* and *William Rumsey.* 5 Brief 35.

Nonsuits, Old and New. *Theodore F. C. Demarest.* Discussing New York decisions. 65 Albany L. J. 363.

North Carolina and Private Corporations. *Thomas B. Womack.* 1 North Carolina J. of L. 108.

Northern Securities Case. *Anon.* 7 Lawgiver 26.

Northern Securities Case, The. *Anon.* 58 Central L. J. 241.

Northern Securities Case, The Anti-Trust Act and the. *Victor Morawetz.* 17 HARV. L. REV. 533.

Northern Securities Company Case, The; a Reply to Professor Langdell. *Daniel H. Chamberlain.* 13 Yale L. J. 57. See p. 289.

Northern Securities Case under a New Aspect, The. *C. C. Langdell.* 17 HARV. L. REV. 41.

Northwest Territories, Mortgages in the. *W. B. Willoughby.* Under Land Titles Act. 24 Can. L. T. 63.

Numerals and Letters in Connection with Articles of Commerce. *Bernard C. Steiner.* Discussing trade-mark protection. 13 Yale L. J. 140.

Oaths Administered without the Use of the Bible. Leaves from a Lawyer's note-book. *Charles W. Tillett.* 1 North Carolina J. of L. 166.

Offenses, Evidence of Similar. *Anon.* 2 Can. L. Rev. 689.

Officers and Confirmation of Nominations by Council or Governing Legislative Body, Appointment or Election of. *Eugene McQuillin.* A fairly comprehensive article with good citation of authority. 58 Central L. J. 163.

Ordinance, Liability of City for Fire Caused by Failure to Enforce. *Anon.* 10 Case and Com. 97.

Ordinances, Liability of Municipality for Failure of its Officers to Enforce. *Anon.* 58 Central L. J. 161.

Ordinances, Liability of Municipality for Failure of its Officers to Enforce. *John G. Farmer.* 40 Can. L. J. 253.

Panama Situation, Legal Aspects of the. *Edwin Maxcy.* 13 Yale L. J. 85.

Parent, Right of an Adult Child to Recover for Services Rendered to a. *Colin P. Campbell.* 57 Central L. J. 323.

Patent, The, Rights of Joint Owners of a. *Dwight B. Cheever.* 2 Mich. L. Rev. 446.

Patented Inventions, Liability of the Government for the Use of. *Charles C. Binney.* 43 Am. L. Reg. N. S. 22.

Pauper Litigants in England, Practice as to Costs of. *Anon.* 13 Madras L. J. 259.

Payment of a Cheque, Stopping. *Anon.* Discussing liability of drawer to payee after payment is stopped. 39 Can. L. J. 726.

Peonage Cases, The. *William Wirt Howe.* 4 Columbia L. Rev. 279.

Peonage, What Constitutes a Condition of. *Anon.* 57 Central L. J. 441.

Percolating Waters: The Rule of Reasonable User. *Ernest W. Huffcut.* 13 Yale L. J. 222.

Performance, Failure of Consideration or Failure of. *H. T.* A plea for discrimination in the use of the terms. 7 Law Notes (N. Y.) 164.

Performance, Specific. *W. Donaldson Rawlins.* An outline of the growth and scope of the doctrine. 29 Law Mag. & Rev. 37.

Personal Injury Cases, Wantonness in. *Paul Speake.* 12 Am. Lawyer 4. See p. 428.

Personal Liberty in English Law, Right of the Subject to. *S. P. J. Merlin.* 29 Law Mag. & Rev. 194.

Personal Liberty in France. *H. Cleveland Coxe.* 13 Yale L. J. 215.

Person, The Firm as a Legal. *William Hamilton Cowles.* 57 Central L. J. 343. See p. 207.

Philippines, Taxation in the. *W. F. Norris.* An outline of the system introduced by the Philippine Commission. 15 Green Bag 538.

Photograph, Property in. *Anon.* Discussing the question with reference to the Victorian Act. 25 Australian L. T. 99.

Physician as an Expert, The. I. *H. B. Hutchins.* 2 Mich. L. Rev. 601.

Physician on the Witness Stand, The. *F. M. Hagan.* 49 Ohio L. Bulletin 195.

Physician's License, Power of State Board of Health under the Missouri Constitution, to Revoke. *Edward J. White.* 57 Central L. J. 423.

Police Powers and Federal Property Guarantees, State. *Charles C. Marshall.* 4 Columbia L. Rev. 153.

Russian Civil Law. *William W. Smithers.* 43 Am. L. Reg. N. S. 137, 213.
Russo-Japanese War, International Aspects of. *T. Baty.* 116 L. T. 358, 381.
Salaries Law in Pennsylvania, Judicial. *Luther E. Hewitt.* 42 Am. L. Reg. N. S. 653.
Sales of Leaseholds by Personal Representatives. *Anon.* Discussing the length of time within which the right of sale may be exercised. 38 Ir. L. T. 135.
Satisfaction, Accord and. *Ben Kendall.* Discussing only the payment of a lesser sum than the whole in satisfaction of a debt. 57 Central L. J. 244.
Schemes to Control the Market. *Bruce Wyman.* 16 Green Bag 80.
Seashore, Public Rights in. *Anon.* 68 Justice of P. 63.
Self-Defense, Homicide in. *Joseph H. Beale, Jr.* 3 Columbia L. Rev. 526.
Servants, Criminal Liability of Publicans for the Acts of. *Anon.* Consideration of the question as governed by English statutes. 68 Justice of P. 159.
Servants, The Basis of Employers' Liability for Acts of their. *A. Pearce Higgins.* Discussing the question by a comparison of different systems of law. 11 J. of the Soc. of Comp. Legislation, N. S. (London) 109.
Servants to Third Persons for Negligence, Liability of. *Anon.* 10 Case & Com. 98.
Service of Process, Interstate. *D. G. Ferguson.* Discussing the effects of acts passed by the first Commonwealth Parliament in Australia. 1 Commonwealth L. Rev. 18.
Services Rendered to a Parent, Right of an Adult Child to Recover for. *Colin P. Campbell.* 57 Central L. J. 323.
Settlement of Child under Sixteen. *Anon.* 67 Justice of P. 493.
Sewers and Pipes, Compensation for Laying. *Anon.* 67 Justice of P. 614.
Similar Offenses, Evidence of. *Anon.* 2 Can. L. Rev. 689.
Singing *vs.* Mimicry. *Anon.* Criticising Bloom *v.* Nixon, 125 Fed. Rep. 977. 8 Law Notes (N. Y.) 249.
Slaughter of the Innocents. *Anon.* Discussing a few Christian Science cases. 40 Can. L. J. 141.
Slavery upon the Constitutions and Laws of the United States and of the State of Alabama, Effect of. *Edward De Graffenreid.* 12 Am. Lawyer 151.
South Africa, Roman-Dutch Law in. *W. R. Bisschop.* 20 L. Quart. Rev. 41.
Special Assessments, Some Legal Aspects of. *Frank L. Sage.* Discussing assessment of abutting owners for street improvements. 2 Mich. L. Rev. 453.
Specific Performance. *W. Donaldson Rawlins.* An outline of the growth and scope of the doctrine. 29 Law Mag. & Rev. 37.
Specific Perfomance for and against Strangers to the Contract. *J. B. Ames.* 17 HARV. L. REV. 174.
Stamps is Subject to Prohibitory Legislation, Whether the Giving of Trading. *Anon.* 57 Central L. J. 421.
Statutory Estates in Place of an Estate Tail. *Albert Martin Kales.* 13 Yale L. J. 267.
Statutory Regulation of the Employments of Women. *Andrew Bruce.* 58 Central L. J. 123.
Steel Corporation Cases, The. *James F. Tracey.* Discussing two New Jersey decisions, which hold that it is within the power of the United States Steel Corporation to issue mortgage bonds in order to retire a portion of its capital stock. 3 Columbia L. Rev. 470.
Stock and the Sheffield Case, Forged Transfers of. *J. L. Thorndike.* 17 HARV. L. REV. 373.
Stock Exchange "Differences" and the Gaming Laws. *W. Strachan.* 20 L. Quart. Rev. 53.
Stock Exchange Seats, Taxation of. *P. H.* 7 Law Notes (N. Y.) 165.
Stock, Forged Transfers of: Another View. *James Barr Ames.* 17 HARV. L. REV. 343.
Stockholders, The Equitable Liability of. *George B. Barrows.* 13 Yale L. J. 66.
Stock Subscriptions, Liability of Subscribers on. *Glenda Burke Slaymaker.* 66 Albany L. J. 4.
Street Railways, Limitations of the Rule Requiring Travellers and others to Stop, Look, and Listen before Attempting to Cross Railroad Tracks as Sought to be Applied to Urban. *Blackburn Esterline.* 58 Central L. J. 222.
Streets in Local Authorities, Vesting of. *Anon.* Discussing the question under English Statutes. 67 Justice of P. 457, 470.
Strikes and Boycotts, Law of. *Charles R. Darling.* 43 Am. L. Reg. N. S. 73.
Subscriptions, Liability of Subscribers on Stock. *Glenda Burke Slaymaker.* 66 Albany L. J. 4.
Subsequent Birth of Children as a Revocation of a Will. *Marvin H. Altizer.* 9 Va. L. Reg. 473, 519. See p. 210.
Suicide and the Law. *Wilbur Larremore.* 17 HARV. L. REV. 331.
Suicide, Life Insurance — Effect of Incontestable Clause in Case of. *Anon.* 58 Central L. J. 128.
Supreme Court, Acts of Congress Declared Unconstitutional by the. *Blackburn Esterline.* 38 Am. L. Rev. 21.

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THE SUPREMACY OF THE JUDICIARY UNDER THE CONSTITUTION OF THE UNITED STATES, AND UNDER THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA.

WHEN a division of governmental powers, into the three categories of legislative, executive, and judicial, is definitely made by a written constitution, in the manner in which such a division of them is made by the Constitution of the United States, and by the Constitution of the Commonwealth of Australia, and the exercise of the powers embraced under each of those categories is explicitly vested in a distinct and separate governmental organ, as is done by each of the above-named constitutions, the three separate organs so created are usually declared by jurists and writers on constitutional law to be co-ordinate in authority within their respective spheres. Both of the above-named constitutions establish a federal system of government of the same distinctive type, in respect of the distribution of legislative powers between the federal legislature and the legislatures of the several states; and neither of them explicitly assigns any supremacy or predominance to any one of the three separate organs of government which each of them has created. But Professor Dicey, in his book, "The Law of the Constitution," says: "Federalism, lastly, means legalism — the predominancy of the judiciary in the constitution — the prevalence of a spirit of legality among the people"[1]

[1] 4th ed. p. 164.

And he proceeds to add, with reference to the United States, "no separate legislature throughout the land is more than a subordinate law-making body, capable in strictness of enacting nothing but by-laws; the powers of the executive are again limited by the constitution; the interpreters of the constitution are the judges. The Bench, therefore, can and must determine the limits of the authority both of the government and of the legislature; its decision is without appeal; the consequence follows that the Bench of Judges is not only the guardian, but also the master of the constitution."

This language of Professor Dicey's may be taken as a substantially correct description of the position conceded to the federal judiciary in the United States by all competent exponents of American constitutional law at the present time. But it is well known that during the first three or four decades after the adoption of the Constitution, the supremacy which Professor Dicey ascribes as a necessary attribute to the judiciary in a federal system of government was emphatically denied to the judiciary in the United States by several able American jurists, who asserted that the power to declare an Act of Congress invalid, because contrary to the Constitution, was not inherent in the judicial department of the government, and that nothing short of an express grant of such a power by the Constitution could justify any attempt to exercise it. The first case in which an Act of Congress was declared invalid by the Supreme Court of the United States was the well known case of Marbury *v.* Madison,[1] which was decided in the year 1803. In referring to the judgment pronounced by Chief Justice Marshall in this famous case, the late Professor Thayer, in his admirable biographical monograph on Marshall, says:

"The reasoning is mainly that of Hamilton in his short essay of a few years before in the Federalist. The short and dry treatment of the subject, as being one of no real difficulty, is in sharp contrast with the protracted reasoning of McCulloch *v.* Maryland,[2] Cohens *v.* Virginia,[3] and other great cases; and this treatment is much to be regretted. Absolutely settled as the doctrine is to-day, and sound as it is, when regarded as a doctrine for the descendants of British colonists, there are grave and far-reaching considerations — such too as affect to-day the proper administration of this extremely important power — which are not touched by Marshall, and which must have commanded his attention if the subject had been deeply considered and fully expounded according to his later method. His reasoning

[1] 1 Cranch 137. [2] 4 Wheat. 316. [3] 6 Wheat. 264.

does not answer the difficulties that troubled Swift, afterwards Chief Justice of Connecticut, and Gibson, afterwards Chief Justice of Pennsylvania, and many other strong, learned, and thoughtful men; not to mention Jefferson's familiar and often ill-digested objections. It assumes as an essential feature of a written constitution what does not exist in any one of the written constitutions of Europe. It does not remark the grave distinction between the power of disregarding the act of a co-ordinate department, and the action of a federal court in dealing thus with the legislation of the local states; a distinction important in itself, and observed under the written constitutions of Europe, which, as I have said, allow this power in the last sort of case, while denying it in the other. . . . So far as any necessary conclusion is concerned, it might fairly have been said with us, as it is said in Europe, that the real question in all these cases is not whether the act is constitutional, but whether its constitutionality can properly be brought in question before a given tribunal. Could Marshall have had to deal with this great question, in answer to Chief Justice Gibson's powerful opinion in Eakin *v.* Raub,[1] in 1825, instead of deciding it without being helped or hindered by any adverse argument at all, as he did, we should have had a far higher exhibition of his powers than the case now affords."

The substance of Chief Justice Gibson's dissenting opinion in Eakin *v.* Raub is contained in the following extracts from it:

"I begin, then, by observing that in this country the powers of the judiciary are divisible into those that are political and those that are purely civil. Every power by which one organ of the government is enabled to control another, or to exert influence over its acts, is a political power. The political powers of the judiciary are derived from certain peculiar provisions in the Constitution of the United States, of which hereafter; and they are derived by direct grant from the common fountain of all political power. On the other hand, its civil are its ordinary and appropriate powers; being part of its essence, and existing independently of any supposed grant in the constitution. But where the government exists by virtue of a written constitution, the judiciary does not necessarily derive, from that circumstance, any other than its ordinary and appropriate powers. Our judiciary is constructed on the principles of the common law, which enters so essentially into the composition of our social institutions as to be inseparable from them, and to be, in fact, the basis of the whole scheme of our civil and political liberty. In adopting any organ or instrument of the common law, we take it with just such powers and capacities as were incident to it at the common law, except where these are expressly, or by necessary implication, abridged or enlarged in the act of adoption; and that such act is a written instrument cannot vary its consequences or construction. . . .

[1] 12 Serg. & Rawle 330.

Now what are the powers of the judiciary at common law? They are those that necessarily arise out of its immediate business; and they are, therefore, commensurable only with the administration of distributive justice without extending to anything of a political cast whatever. . . . The constitution of Pennsylvania contains no express grant of political powers to the judiciary. But to establish a grant by implication the constitution is said to be a law of superior obligation; and, consequently, that if it were to come into collision with an act of the legislature, the latter would have to give way. This is conceded. But it is a fallacy to suppose that they come into collision before the judiciary. . . . The constitution and the right of the legislature to pass the act may be in collision. But is that a legitimate subject for judicial determination? If it be, the judiciary must be a peculiar organ to revise the proceedings of the legislature, and to correct its mistakes; and in what part of the constitution are we to look for this proud pre-eminence? . . . It is the business of the judiciary to interpret the laws, not to scan the authority of the law giver; and without the latter, it cannot take cognizance of a collision between a law and the constitution. So that to affirm that the judiciary has a right to judge of the existence of such a collision, is to take for granted the very thing to be proved. . . . Now, as the judiciary is not constituted for that purpose, it must derive whatever authority of the sort it may possess from the reasonableness and fitness of the thing. But, in theory, all the organs of the government are of equal capacity; or, if not equal, each must be supposed to have superior capacity only for those things which peculiarly belong to it; and as legislation peculiarly involves the consideration of those limitations which are put on the law-making power, and the interpretation of the laws, when made, involves only the construction of the laws themselves, it follows that the construction of the constitution in this particular belongs to the legislature, which ought, therefore, to be taken to have superior capacity to judge of the constitutionality of its own acts. But suppose all to be of equal capacity in every respect, why should one exercise a controlling power over the rest? That the judiciary is of superior rank has never been pretended, although it has been said to be co-ordinate. It is not easy, however, to comprehend how the power which gives the law to all the rest can be of no more than equal rank with one which receives it, and is answerable to the former for the observance of its statutes. Legislation is essentially an act of sovereign power; but the execution of the laws by instruments that are governed by prescribed rules, and exercise no power of volition, is essentially otherwise. The very definition of law, which is said to be 'a rule of civil conduct prescribed by the supreme power of the state,' shows the intrinsic superiority of the legislature. It may be said that the power of the legislature also is limited by prescribed rules. It is so. But it is nevertheless the power of the people, and sovereign so far as it extends. It cannot be said that the judiciary is co-ordinate merely because it is established by the constitution.

If that were sufficient, sheriffs, registers of wills, and recorders of deeds, would be so too. [That is, under the constitution of Pennsylvania.] Within the pale of their authority the acts of these officers will have the power of the people for their support; but no one will pretend they are of equal dignity with the acts of the legislature. Inequality of rank arises not from the manner in which the organ has been constituted, but from its essence and the nature of its functions; and the legislative organ is superior to every other, inasmuch as the power to will and command is essentially superior to the power to act and to obey. It does not follow, then, that every organ created by special provision in the constitution is of equal rank. Both the executive, strictly as such, and the judiciary, are subordinate; and an act of superior power ought, one would think, to rest on something more solid than implication."

When the foregoing opinion was cited before its author, twenty years after its delivery (1845), he said to the counsel who cited it:

"I have changed my opinion for two reasons. The late convention by their silence sanctioned the pretensions of the courts to deal freely with the acts of the legislature; and from experience of the necessity of the case." [1]

The second reason given by Chief Justice Gibson for changing his opinion is a concise but pregnant and effectual reply to his elaborate argument on the opposite side twenty years earlier. If a written constitution, which imposes limits on the powers of all the organs of government which derive their existence from its provisions, is to be preserved in its integrity, as a fundamental law controlling the action of the governmental organs which it has created, there must be power lodged somewhere to restrain any infringement of it by any one of those organs, as soon as any person who is entitled to the benefit of its provisions chooses to seek redress for any detriment he has suffered by such an infringement of it. A written law for the violation of which there does not exist a positive and certain method of redress available to any person who is damnified by a violation of it, is a nullity, or is, at the most, only a precept of conduct which those to whom it is addressed may follow or disregard as they think fit; and if infringements of a written constitution by the legislature are to remain without correction or redress, until the legislature retraces its steps, the constitution ceases for an indefinite period of time to exist in its original integrity; and the particular provision of it which has been violated is, during the same indefinite period

[1] Norris *v.* Clymer, 2 Pa. St. 277, 281.

of time, practically repealed. If this result of an infringement of a written constitution by the legislature is to be avoided, there must be a tribunal to which an immediate appeal for redress can be made by any person who is damnified by the action of the legislature; and the tribunal which affords redress in such case necessarily exercises judicial power, because it declares what is and what is not law, and applies what it declares to be law to the facts submitted to its investigation. In searching for a tribunal which may be *prima facie* supposed to have authority under the constitution to afford redress in such a case, the person seeking the redress will naturally and inevitably select the judiciary, because it is explicitly invested by the constitution with judicial power; and his appeal to the judiciary for redress cannot be refused without an assertion of the proposition that the redress he claims is not within the ambit of the judicial power. Chief Justice Gibson attempted to support that proposition by the argument that to declare an act of the legislature invalid was an exercise of political and not judicial power, and that the judiciary could not exercise any political function by virtue of the powers inherent in it under the common law. Let us examine this argument.

If it be conceded that to declare an act of the legislature invalid is a political and not a judicial function, it may, nevertheless, be a function which the judiciary may find it necessary to perform in particular cases, as inseparable from a full and adequate performance of its truly judicial functions. The decisions of the judiciary in such cases are political only in their consequences, and not in their primary and intrinsic character as declarations of the contents of the law. And if a court performs a political function when it declares an act of the legislature invalid, because unauthorized by the constitution, it also performs a political function when it declares that an act of the executive department of the government invalid for the same reason; and this has frequently been done by the courts of common law in England in regard to acts of the Crown, in whom all executive power is primarily vested by the unwritten constitution of that country. Examples of the exercise of this function by the courts of common law in England are found in the Case of Proclamations in the year 1610,[1] the Bankers' Lease in 1690,[2] Wilkes *v.* Wood in 1763,[3] and Leach *v.* Money in 1765.[4] But under the unwritten constitution of Eng-

[1] 12 Coke's Reports 74.
[2] 1 Freeman 331.
[3] 19 State Trials 1153.
[4] 3 Burrows 1692.

land the Crown is not only the primary depositary of all executive power. It is also invested with large legislative powers in regard to colonies and dependencies acquired by conquest or treaty; and the English courts of common law have repeatedly declared the limits of those powers, and have in several cases declared an attempted act of legislation by the Crown, or by its local representative, to be invalid. The leading case on this subject is Campbell *v.* Hall.[1] In that case the Court of King's Bench pronounced a proclamation of the King which purported to levy duties on exports from the Island of Granada to be void, because the Crown had by a previous proclamation delegated its legislative power in the island to a local assembly. In the later case of Cameron *v.* Kyte,[2] the Judicial Committee of the Privy Council declared invalid an attempted exercise of legislative power by the Governor of the Colony of Berbice in the name of the Crown.

In referring to the cases in the reign of James I., in which the Court of King's Bench, under the presidency of Chief Justice Coke, decided political and constitutional questions, the late Professor Gardiner observes in his History of England: [3]

"Bacon's dislike of admitting the judges to be the supreme arbiters on political questions arose originally from his profound conviction that such questions could only be properly treated of by those who were possessed of political knowledge and experience. He felt, truly enough, that the most intimate acquaintance with statutes and precedents was insufficient to enable a man to decide upon state affairs; and if he had ever been inclined to forget it, the example of Coke was constantly before his eyes as a proof that no amount of legal knowledge will ever constitute a statesman. Nor was this a consideration of small importance. As the relations between James and his Parliament then stood, the judge who decided upon the law which assigned limits to each could not avoid usurping the functions of a statesman. He not only declared how far the existing law applied to the facts of the case, but fixed the constitution of the country for the future. It was true that theoretically the decisions of the judges were liable at any time to be reversed by Act of Parliament; but the day was far distant when it would be possible to obtain the joint assent of the Crown and the Parliament to any act affecting the powers of either. For the present, the judges, if they succeeded in maintaining their independence, would have in their hands the supreme control over the Constitution. They would be able, without rendering account to any one, to restrain or extend the powers of

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[1] 1 Cowper 204.
[2] 3 Knapp, P. C. C. 332.
[3] Vol. 2, p. 261.

the Crown for an indefinite period. In 1606 they had, by a decision from the bench, assigned to the King the right of levying Impositions, which, in spite of all opposition, he retained for no less than thirty-five years. If it pleased them, they might deprive him, in the same way, of rights which he considered to be essential to his government."

It would be difficult to suggest a supremacy of the judiciary under any system of government more emphatic in its character than that which is described in the foregoing extract; and the political character and consequences of the power exercised by the judges of the courts of common law in England at the time to which the writer of it refers are beyond all dispute. The same historian then proceeds to describe the position occupied by the judiciary in England since the time when Parliament acquired supreme control of the government of the country, and in that connection he observes:

"The victory of the Parliament has, indeed, thrown the supreme political power into other hands than those in which Bacon would have placed it; but it is not one of the least happy results of that victory that it has now become possible to exercise a control over the judges without sacrificing their independence. It is Parliament which decides what the Constitution shall be, and having this power in its hands, it is by no means inclined to interfere with the judges in declaring, in the exercise of the proper duties of their office, what the Constitution is at any given moment."

The description here given of the position occupied by the courts of law in England, with the consent of Parliament at the present time, in relation to questions of constitutional law, is equally applicable to the judiciary in the United States, and to the judiciary in the Commonwealth of Australia, under the constitution from which it in each case derives its existence. When the courts in England declare any executive or legislative act of the Crown to be illegal at common law, and not authorized by any statute, they declare that the Constitution does not empower the Crown to do it. In like manner when the judiciary in the United States, or in Australia, pronounces an Act of Congress, or an Act of Parliament of the Commonwealth, to be invalid, it declares that the constitution from which Congress, or the Parliament of the Commonwealth, derives its existence does not authorize the attempted exercise of legislative power. But in each of the above mentioned cases, whether in England, or in the United States, or in Australia, the judges declare what the constitution says, only, as Gardiner

has phrased it, "in the exercise of the proper duties of their office," or, in other words, only in connection with or incidental to the adequate performance of judicial functions.

One of the most pertinent illustrations of a declaration by an English court of the limited extent of a particular power inherent in a political body under the British Constitution is the famous case of Stockdale *v.* Hansard.[1] In the opening part of his judgment in that case, Lord Denman, C. J., said, in reference to the first plea of the defendant, that it contained a proposition "wholly untenable and abhorrent to the first principles of the Constitution of England." And the judgment of Coleridge, J., in the same case contains numerous references to the limitations placed by the British Constitution upon the powers vested by it in the separate governmental bodies which exist under it. The court decided in that case that the House of Commons, by ordering a report to be printed could not, under the then existing law, legalize the publication of libellous matter. That declaration of the limitation imposed by the Constitution upon the inherent powers of the House of Commons was made by the court in the exercise of a purely judicial function in relation to a claim for damages made by one private person against another private person. The House of Commons is not in itself the legislative organ of government under the British Constitution, but it is a co-ordinate branch of the supreme legislative organ of the Constitution; and it seems impossible to suggest any reason why the judgment in Stockdale *v.* Hansard should not have been the same as it was, if the House of Commons had been the sole legislative Chamber possessing original legislative power in the British Empire, so long as assent and publication by the Crown were necessary to the validity of an alleged law.

In the two later cases of Bradlaugh *v.* Erskine[2] and Bradlaugh *v.* Gosset,[3] the Court of Queen's Bench decided that the House of Commons is not subject to the control of the law courts in matters relating to its own internal procedure, and that what is said and done within its walls cannot be inquired into elsewhere. This is also a declaration of a portion of the law of the British Constitution relating to the House of Commons, and it was made in the exercise of the purely judicial function of deciding upon the validity of

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[1] 9 A. & E. 1.
[2] 47 L. T. Rep. 618.
[3] L. R. 12 Q. B. D. 271.

a demurrer in an action for damages for an assault upon the plaintiff.

It therefore appears that there is not any solid foundation for the assertion that the judicial power exercisable by the courts in England under the common law does not include any jurisdiction to decide questions which may require for their determination a declaration of the limits or extent of the powers possessed by a political body under the Constitution. And if there is not any solid foundation for that assertion, the argument founded upon it, that the judiciary under a written constitution cannot, without a specific grant of power for that purpose, exercise a jurisdiction which is political in its character or consequences, is found to be without the historical support which the assertion was supposed to give to it.

The essential and ultimate question involved in the controversy about the competence of the judiciary under a written constitution to declare invalid an act of the legislature is, what is the essential nature of judicial power? The distinction between legislative and judicial power was concisely and clearly expressed by the Earl of Chatham in his speech on the expulsion of Wilkes from the House of Commons, when he said "*legem facere* and *legem dicere* are powers clearly distinguishable from each other in the nature of things." It has always been the distinctive and characteristic function of the judge, in every community in which the distinction between judicial and executive and legislative functions has been recognized in the structure of the government, to declare what the law is in reference to any particular set of facts submitted to him for investigation as a basis of any alleged legal right or liability. The power which is vested in the judge to enable him to perform this function necessarily includes the power to declare that a particular law alleged by a litigant to be applicable to a particular set of facts is not applicable to them. It also necessarily includes the power to declare that an alleged law which a litigant asserts to be applicable to his case does not exist, if in fact there is not any such law in existence. This is the particular form of the exercise of judicial power which is performed by the judiciary under a written constitution when it declares an alleged law to be invalid because beyond the competency of the legislative body that has attempted to enact it. That such an alleged law is invalid, so long as the constitution which it infringes is recognized as a law of superior obligation, has never been

denied by those who have disputed the competency of the judiciary to declare its invalidity; but they have argued that without a specific grant of power to the judiciary to determine the question of the validity of an alleged law, it is determinable by that authority alone by which the constitution was established. The tribunal which those who deny the competency of the judiciary assert to be the only one which has authority to declare such an alleged law invalid, is composed of the persons who elect the members of the legislature, and its decision, in any case in which an appeal was made to it, would be pronounced and recorded by the legislature by a repeal of the invalid law. But neither the composition of the tribunal appointed to determine a particular question, nor the mode of procedure adopted by it, can alter the essential nature of the question to be determined; and a declaration by any tribunal, whatever may be its composition or procedure, that an alleged law is invalid, because enacted in contravention of a superior law, is an exercise of judicial power, because it is an authoritative declaration of the contents of the superior law. If it be argued that a repeal of an unconstitutional law by the legislature itself in obedience to a mandate from the electors would not be an exercise of judicial power, because the repeal would not be made for the purpose of determining the legal rights or liabilities of particular persons in relation to a particular set of facts which has previously arisen; the obvious reply is that it is almost impossible to suppose that the electors would be stirred to demand the repeal of an unconstitutional act of the legislature under which no question of the legal rights or liabilities of some or all of the electors under the constitution had arisen; and the only thing required to make the repeal of the invalid law an exercise of judicial power in the fullest sense of the word would be a provision in the act of repeal for extending appropriate redress to any persons who had been damnified by the repealed legislation.

The Constitution of the United States provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." It also declares that "this Constitution and the laws of the United States made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land." But if the power to declare that an alleged law of Congress is invalid when it has been enacted in contravention of the Constitution

of the United States has not been conferred upon the federal judiciary by the Constitution, then "the judicial power of the United States" does not include the power to declare in particular cases a particular portion of "the supreme law of the land." The Constitution enumerates the several classes of cases to which the judicial power of the United States shall extend, and, therefore, by necessary implication, excludes all other classes of cases; but it does not give any restrictive definition of the judicial power of the United States which precludes the tribunals in which it is vested from declaring the whole of the law applicable to any case submitted to them. Nor does the Constitution impose any restriction or limitation of any kind upon the extent of the relief or redress to be given by the tribunals in which the judicial power is vested in any case to which the power extends. But the denial of the competency of the federal judiciary to inquire into the validity of an Act of Congress involves the proposition that the Constitution supposes that cases might arise under it which would be within the jurisdiction of the Supreme Court, and which, therefore, might properly be submitted to that tribunal for adjudication, and at the same time would be exempt from the application of that part of "the supreme law of the land" which is contained in the Constitution.

The substance of most of the foregoing observations upon the nature of judicial power, and upon the consequences of a denial of the competency of the judiciary to inquire into the validity of an Act of Congress, is contained in Chief Justice Marshall's judgment in Marbury *v.* Madison; and the reply which Chief Justice Gibson made to Marshall's argument was as follows:

> "But it has been said to be emphatically the business of the judiciary to ascertain and pronounce what the law is; and this necessarily involves a consideration of the Constitution. It does so; but how far? If the judiciary will inquire into anything beside the form of the enactment, where shall it stop? There must be some point of limitation; for no one will pretend that a judge will be justified in calling for election returns, or scrutinizing the qualifications of those who composed the legislature."

This answer seems to have been made in a moment of forgetfulness of the important distinction between the intrinsic character of an accomplished act proceeding from a source having the necessary legal authority to perform it, and the procedure prescribed for accomplishing it. In regard to all questions relating to pro-

cedure and prescribed formalities, the maxim *Omnia presumuntur rite et solemniter esse acta* applies, whenever the evidence necessary to prove the fact of the performance of the act does not carry with it proof of a fatal omission or illegality in the performance of it. The legal presumption of validity may be rebutted in some cases; but there are other cases in which it is irrebuttable, and in which the maxim above quoted is a statement of a definite and final conclusion of law. It is a conclusive and irrebuttable presumption of law that every final judgment of a competent court is correct in both law and fact. *Res judicata pro veritate habetur.* In the case Rex *v.* Carlile,[1] Lord Tenterden, C. J., said: "The authorities are clear that a party cannot be received to aver as error in fact a matter contrary to the record. . . . A record imports such absolute verity that no person against whom it is admissible shall be allowed to aver against it." The original copy of an Act of the British Parliament, or of an Act of the Parliament of the Commonwealth of Australia, which bears the signature of the Crown, or of the Governor-General of the Commonwealth, as the case may be, and the original copy of an Act of Congress which has received the signature of the President, or which is certified in the prescribed manner to have been passed over his veto, are all in the same position as a record of a final judgment of a court of last resort, so far as the presumption of the legality of the procedure by which each of them came into existence is involved. But in the matter of the presumption in favor of the legality of their contents, an Act of Congress and an Act of the Parliament of the Commonwealth of Australia are not in the same position as that of an Act of the British Parliament. In the case of an Act of the British Parliament no inquiry into the legality of its contents is possible because there is not any higher law which it can infringe. But in the case of an Act of Congress, or of an Act of the Parliament of the Commonwealth of Australia, there is a higher law to which it must conform, and the presumption of the legality of its contents is, therefore, rebuttable before whatever tribunal has authority to inquire into the legality of them.

When Chief Justice Gibson announced that he had changed his opinion "from experience of the necessity of the case," he doubtless realized that the only alternative to the supremacy of the judiciary under a federal system of government was the supremacy of the leg-

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[1] 2 B. & Ad. 367.

islature, and that the supremacy of the legislature meant the emasculation of the Constitution. In his dissenting opinion in Eakin *v.* Raub, he had conceded a superiority of rank to the legislature, and had declared that "both the executive, strictly as such, and the judiciary are subordinate." This assertion is clearly correct so far as it means that the executive and the judiciary are under a legal obligation to execute and administer all valid acts of the legislature. But this fact demonstrates the necessity of the supremacy of the judiciary as the organ for interpreting a written constitution, because, as Bagehot has well said, "A legislative chamber is greedy and covetous [of governmental power]; it acquires as much, it concedes as little as possible." Under successive encroachments by the legislature the stability of a written constitution would be reduced to a shadow, and the contents of it would be changed with every interpretation the legislature might think fit to put upon it in favor of its own power under it. In countries which have a unitary form of government under a written constitution, like France and Belgium, the effects of infringements of the constitution by the legislature are not so serious, because the legislature in such countries possesses all the primary legislative power exercisable under the constitution, and the limitations imposed upon the legislature by the constitution are mostly of such a character that public opinion and sentiment may be safely relied upon to protest quickly against any violation of them. In Switzerland the provisions made by the constitution for the use of the referendum, and the frequent resort made to it, provide a protection against such successive infringements of the constitution by the federal legislature as would radically change the character of it; but they do not provide that immediate channel of redress which the judiciary in America and in Australia provides for every citizen whose personal or proprietary rights are invaded by unconstitutional legislation.

In the Commonwealth of Australia the question of the competency of the judiciary to inquire into the validity of an Act of the Parliament of the Commonwealth was directly submitted to the Supreme Court of the state of Victoria, in the first year of the existence of the Commonwealth, in the case of Kingston *v.* Gadd.[1] This case arose under the Commonwealth Customs Act, 1901, and was heard and determined by the court in the exercise

[1] 27 Vict. L. R. 417.

of the federal jurisdiction conferred by that act upon the supreme courts of all the states for a limited period in respect of questions arising under it. The defendant alleged that the section of the Commonwealth Customs Act under which he had been made to pay a penalty for a breach of it was *ultra vires* the powers of the Parliament of the Commonwealth under the Constitution of the Commonwealth, and was, therefore, invalid. The counsel for the plaintiff had contended that when there was not any question of a conflict of legislation between a state and the Commonwealth, or any question of encroachment by the Parliament of the Commonwealth upon the legislative domain of the states, the courts will not inquire into the validity of an act of the Parliament of the Commonwealth duly passed and assented to by the Governor-General, and not disallowed by the Crown within the statutory time allowed for that purpose. The court rejected this contention and based its decision on the fifth introductory section of the Commonwealth of Australia Constitution Act, which declares that "This Act, and all laws made by the Parliament of the Commonwealth under the Constitution shall be binding on the courts, judges, and people of every State, and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth." The court was composed of three judges, each of whom read a written judgment. Mr. Justice Williams said:

"The words 'and all laws made by the Parliament of the Commonwealth under the Constitution' mean 'in pursuance of the Constitution.' If they are not so made they are not binding on this Court, and it is, therefore, our duty to inquire and ascertain whether the actions to which we have been referred, and under which the penalties in this action are sought to be enforced, and in so far as they relate to the specific offences charged, constitute legislation which the Parliament of the Commonwealth has power to impose under or in pursuance of the Constitution."

Mr. Justice Holroyd said:

"At the recent hearing of this action a proposition was advanced by counsel for the plaintiff, which, if I rightly understand it, I hope will not find acceptance with any judge. It is this, that if the Parliament of the Commonwealth makes a law which does not encroach upon the legislative power of any state, no court or judge in any state has the right to declare

that such law was one which the Parliament of the Commonwealth was not authorized by the Constitution to make, or even the right to inquire into the validity of any such law. In my opinion that is not the true construction of Section 5 of the Commonwealth Constitution Act. It is by that section enacted that the Commonwealth Constitution Act itself and all laws made by the Parliament of the Commonwealth under the Constitution shall be binding on the courts, judges, and people of every state and of every part of the Commonwealth, notwithstanding anything in the laws of any state. *Expressio unius exclusio alterius.* All laws made by the Commonwealth but not made under the Constitution — that is, not made by virtue of the powers conferred upon the Commonwealth by its Constitution — are not binding upon the courts, judges, or people of any state, and ought to be rejected by the courts and judges of every state as invalid whenever any question arises as to their validity."

Mr. Justice Hood said:

"The legislative powers of the Commonwealth Parliament are delegated powers bestowed by the paramount authority, the Parliament of Great Britain. That being so, it seems to me that the authorities quoted in respect to the duties of English courts with regard to English legislation cannot be applied in their full extent in the relations of this Court to the Federal Parliament. A distinction exists which it may not be easy to define, but which is none the less substantial, because the delegated authority must be exercised within the prescribed limits and over the prescribed subjects. The Courts, therefore, before enforcing Commonwealth law ought to investigate and determine whether or not that law is in substance one which there is jurisdiction to make."

These extracts from the judgments of the three judges who composed the court, illustrate their unanimity in the opinion that "the judicial power of the Commonwealth," which is vested by Section 71 of the Constitution of the Commonwealth in the courts therein mentioned, is not restricted in its exercise by the political consequences of any judgment which any of those courts may pronounce in any case in which an interpretation of the Constitution of the Commonwealth is involved. It will also be observed that the extract from the judgment of Mr. Justice Holroyd contains an argument which finds, in the fifth introductory section of the Act of the Imperial Parliament which establishes the Constitution of the Commonwealth, the specific authority which Chief Justice Gibson at one time supposed to be necessary to enable the judiciary under a written constitution to reject an alleged law which had been enacted by the legislature in contravention of the Constitu-

tion. If the maxim *expressio unius exclusio alterius* supplies a correct and safe rule of construction for the interpretation of the section of the Commonwealth of Australia Constitution Act to which Mr. Justice Holroyd applied it, in the case above mentioned, it must be equally applicable to the second section of Article 6 of the Constitution of the United States. The language of each of the two sections is almost identical with that of the other, with the addition of the words "shall be the supreme law of the land" in the Constitution of the United States. The additional words do not make the maxim less applicable to the construction of the section in which they are found; and if the section can be properly read as declaring that any Act of Congress enacted in contravention of any provision of the Constitution shall not be binding on the courts or judges of any states, the whole controversy about the competency of the judiciary to reject any such Act of Congress as void is settled by a direct provision of the Constitution in reference to the matter.

In his biography of Chief Justice Marshall, the late Professor Thayer refers to the position of a President who finds himself in the situation in which President Johnson found himself when the Reconstruction Acts which he had vetoed because he believed them to be unconstitutional were enacted by Congress over his veto; and he asks upon what ground should a President in such a position execute an Act of Congress which he believes to be contrary to the Constitution he has taken an oath to support? He also refers to the position of the House of Representatives when it is required to vote the money necessary to carry out a treaty which it believes to be unconstitutional. And he asks in reference to both cases, "Is the situation necessarily different when a court is asked to enforce a legislative act?" The situation is not necessarily different if the court is not clothed with a power to review an Act of Congress which is not conferred on any other organ of the government. But if the court is clothed with such a power, the situation is not parallel to that of a President who believes an Act of Congress to be unconstitutional. If a President could rightfully refuse to execute an Act of Congress which he believed to be unconstitutional, there does not appear to be any reason why any subordinate officer of the government, who has taken an oath to support the Constitution could not rightfully do likewise. But in any such case in which a subordinate officer refused to perform a duty imposed upon him by an Act of Congress,

an appeal could be made to the courts to compel him to perform it. If the court agreed with the opinion of the recalcitrant officer and declared the act to be unconstitutional, the court would nevertheless exercise a power not vested in the officer, that is to say, the power of determining whether he had been guilty of a breach of law. But the officer had previously attempted to determine that question for himself when he decided not to obey the act. He had therefore attempted to exercise a power not vested in him; and a President does the same thing if he refuses to execute an Act of Congress which he believes to be unconstitutional, but which has not been declared to be invalid by the judiciary. When he obeys the act he does not attempt to determine the question of its validity, or the question whether he is guilty or not of a breach of law in obeying it. He is in the same position as that occupied by every officer of the government who is under a legal obligation to obey the commands of a superior officer. The responsibility for the legality of any command given to the subordinate officer in such a case rests upon the superior officer who gives it; and any person who is damnified by the execution of the command must appeal for redress to the authority, if there is any such, to which the superior officer is responsible, and which is empowered by law to give redress in such cases. Congress is not responsible in any manner whatever to the judiciary for the consequences of unconstitutional legislation. But the judiciary is empowered to extend to every person who is damnified by unconstitutional legislation whatever redress is provided by law for such cases. The President knows this when he executes legislation which he believes to be unconstitutional; and by faithfully executing such legislation in accordance with the will of Congress, he obeys the Constitution by leaving the question of the validity of the legislation to be decided by the tribunals in which the Constitution has vested the power to decide it.

The supremacy of the judiciary, whether it exists under a federal or a unitary constitution, finds its ultimate logical foundation in the conception of the supremacy of law as distinguished from the possession and exercise of governmental power. If governmental power is in any case unlimited, the exercise of it is not subject to any law, and it is therefore impossible that the judiciary, in such circumstances, should have any authority to declare any exercise of it invalid. But if governmental power is in any case limited by a law proceeding from a source superior in political power to the

organ by which such limited governmental power is exercised, the constant and immediate supremacy of that law cannot be maintained without the existence of a separate tribunal which has authority to declare the contents of that law whenever an appeal is made to it to do so in exercise of its proper functions. The courts of law in England have not hesitated to declare acts of the Crown, legislative and executive, invalid, because they were contrary to law, and the Crown is under the law. The law in many of those cases was unwritten, but it was none the less definite law, and the authority of the courts to declare it maintained its supremacy so long as it continued to exist. If, under a written constitution, the powers of the legislative organ of the government are defined and limited, the supremacy of the law which defines and limits those powers cannot be regularly and constantly maintained against attempted infringements of it by the legislature, if there is not a separate tribunal invested with authority to declare that law at the appeal of any person who claims the protection of it. The conception of the supremacy of law above the possession and exercise of governmental power is the peculiar achievement and inheritance of the English-speaking race. But before any conception or ideal of the social or political relations of men can produce practical results, it must be embodied in one or more social or political institutions; and in the supremacy of the judiciary the conception of the supremacy of law has found its appropriate and beneficial application to the legal and political relations of the individual to the state.

A. Inglis Clark.

HOBART, TASMANIA, July, 1903.

THE ORIGIN OF THE RIGHT TO ENGAGE IN INTERSTATE COMMERCE.

THE provision of the Constitution which compels the courts to distinguish between interstate commerce and that commerce which is domestic within each state, presents the problem of projecting a physical boundary line as an economic distinction. This is not always possible. The history of the subject offers some logical principles which can be followed so far as they go, but where these fail the courts can only endeavor, largely by arbitrary methods, to establish rules capable of practical use.

The subject is somewhat further complicated by the fact that the federal power over commerce is derived not alone from the commerce clause nor wholly excluded from the domestic commerce of the states, while on the other hand the states have jurisdiction to a considerable extent over interstate commerce.

The federal power over travel and transportation resulting from the construction of the Constitution in Crandall *v.* Nevada[1] is based upon the rights and duties of citizens and of the government, although it is extended to include transportation conducted by corporations.

The Fourteenth Amendment and the Fourth Article of the Constitution protect also the rights of citizens, although the Amendment goes beyond the provision of the Article in securing to all persons within the jurisdiction of a state, whether citizens, corporations, or aliens, the equal protection of the laws. None of these powers is necessarily commercial in nature, nor limited in operation to the transportation which crosses state lines. So far as they reach commerce at all, both domestic and interstate commerce fall equally within their operation, and as the right to engage in domestic commerce does not originate in these federal powers the right to engage in interstate commerce must also find its source elsewhere.

The question is thus presented as to the source of the right to engage in interstate commerce, — a question not only of theoretical interest, but having also practical bearings.

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[1] 6 Wall. 35.

It has been strongly urged, for example, that the federal government should exclude from interstate transportation some classes of goods, which, intrinsically, are legitimate subjects of commerce, such as "trust"-made goods, the feathers of certain birds, or the products of convict labor.[1]

If the right to engage in interstate commerce find its source only in federal law, this argument may possibly be correct, — the right may be one which the federal government may grant or withhold at pleasure.

On the other hand, if the right be not derived solely from the federal government, but originate in state law, it may perhaps be one of the privileges and immunities of state citizenship which are protected by the Constitution, or it may for other reasons be beyond federal prohibition.

"Like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument."[2]

These questions it is not proposed here to discuss. We are now concerned solely with the preliminary question whether the right to engage in interstate commerce originates in state or federal law.

It may be well also at this point to emphasize the fundamental difference between interstate and foreign commerce. The states of the Union are not known to foreign nations. So far as relates to other countries American commerce is necessarily national in character, and is conducted under federal authority and protection alone,[3] without reference to the question whether as between

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[1] In his speech at Pittsburg, October 14, 1902 (36 Cong. Rec. 412), Attorney-General Knox advocated the adoption of such legislation as a method of bringing the great industries of the country within effective federal control. Admitting apparently, as is unavoidable, that the manufacture and production of articles of commerce are within state jurisdiction, as is also the creation of corporations, determination of amount of capital, publicity of operation, etc., Mr. Knox nevertheless urges that it is reasonable to say that Congress may "deny to a corporation whose life it cannot reach the privilege of engaging in interstate commerce except upon such terms as Congress may prescribe to protect that commerce from restraint. Such a regulation would operate directly upon commerce, and only indirectly upon the instrumentalities and operations of production."

In other words, it is the position of the Attorney-General that Congress has uncontrolled power to regulate or to prohibit — at least partially — interstate commerce, and that it may use this power to accomplish results which are wholly beyond its jurisdiction.

[2] Monongahela Navigation Co. *v.* U. S., 148 U. S. 312, 336.

[3] Lord *v.* Steamship Co., 102 U. S. 541.

state and federal governments the right to engage in commerce originate in the law of one jurisdiction or the other. In foreign relations the general government stands in the place of and represents every state. An embargo of foreign commerce by federal law may therefore be proper, for the federal government cannot be compelled to grant or to continue its authority and protection.

As to interstate commerce no such considerations arise. Here the question is presented solely as between the individual and state and federal governments. The subject is not affected by international considerations, nor does the United States in these relations take the place of, or represent a state or state laws. The question is therefore clearly presented whether as between these parties the right to engage in interstate commerce is derived from state or federal law.[1]

The essential element which for present purposes constitutes interstate commerce is found in the right of an individual to go, or to ship his goods, from one state to another. This, from the standpoint of the shipper, is interstate commerce, and the right of every person and corporation to engage in this commerce is secured by a correlative duty which the law imposes upon interstate carriers to receive goods for carriage and to transport them from one state to another. It is evident that the carrier's duty to transport goods to a specified place out of the state can exist only in favor of those entitled to send them to that place, and the source of the right and of the duty are therefore the same. The origin of the right to engage in interstate commerce may therefore conveniently be traced by an examination into the source of the obligations which are imposed by law upon an interstate carrier.

By English law a common carrier was under an imposed duty to receive, carry, and deliver, and while goods were in his possession to answer for them as insurer save as against two perils, — acts of God and of public enemies. The obligation which is thus stated in double form was in fact a single duty, — that to carry safely, — the power which imposed the duty measuring also the extent of the liability thus created.

As early as the reign of Charles II. it was held that the liability of an insurer rested upon a carrier engaged in foreign commerce,[2] and though in this case the loss occurred in England, nevertheless

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[1] Prentice & Egan, The Commerce Clause of the Federal Constitution, 37–42.

[2] Mors *v.* Slue, T. Raym. 220.

the liability was regarded as attaching to the carrier so long as he had charge of the goods; — the duty was not restricted to the territory of the sovereign which imposed it.[1] In this country many cases of the same character exist and the rule appears to be well settled.[2]

In most instances, however, the cases concern the carrier's liability after acceptance of the goods, and although the power of the sovereign which imposed this liability must have extended also to impose the duty of acceptance, nevertheless there was no express decision upon this point so far as concerned transportation beyond the realm of England until the case of Crouch *v.* London & N. W. R.[3] in 1854. This was an action to recover damages caused by defendant's refusal to accept goods as a common carrier, for transportation from London to Glasgow. On the part of the railway company, it was urged that the duty of carriage did not extend beyond the realm by whose law it was imposed. Upon this subject Jervis, C. J., said:

"It is not denied, — although the authorities on the subject are neither numerous or satisfactory, — that, if a man holds himself out as a common carrier between two places which are within the realm, he is bound to carry all goods (within reasonable limits) that may be tendered to him to be carried between those places. The only question that arises upon this part of the case, is, whether that rule applies where one of the termini is a place out of England. I am of opinion that it does. Where a party who holds himself out as a common carrier accepts goods, the common law, — that is the law founded upon the custom of the realm, — engrafts upon such acceptance a contract to carry safely and to insure, subject only to two exceptions, viz. the act of God and the Queen's enemies. It was admitted in the course of the argument, and indeed, it could not be denied, that, if the defendants had accepted the goods in London, the common law obligation to carry them to Glasgow would have attached. The case of Morse *v.* Slue, 1 Ventr. 190, T. Raym. 220, 1 Mod. 85, 2 Keble, 866, 3 Keble, 75, 112, 135, 2 Levinz, 69, is admitted to be an authority to that extent: and Molloy's commentary on that case[4] puts the matter beyond doubt. If, then, it is admitted, that, when once the defendants have held themselves out to be common carriers, there is engrafted upon their acceptance of the goods to be carried a common law liability to *carry* to all places to which they profess to carry, even if one of those places should be beyond the

[1] Nugent *v.* Smith, 1 Com. Pl. Div. 19, 23; Elliott *v.* Rossell, 10 Johns. 1.

[2] See review of early decisions by Chancellor Kent in case last cited.

[3] 14 C. B. 255.

[4] De Jure Maritimo, Book II. c. 2, sec. 2.

confines of the realm, it would seem that they must equally take upon themselves the other part of the common law liability of carriers, viz. an obligation to *accept* all goods which are offered to them for conveyance to and from the places to which they profess to carry, whether one of those places be without the realm or not."

In this opinion Cresswell, J., concurred, saying:

"It is said that they [the defendant company] cannot be *common* carriers from London to Glasgow, because a portion of the latter journey is beyond the confines of England. I apprehend, however, it is clear that the defendants may be common carriers out of the realm as well as within it. A common carrier is one who, in the language of Lord Holt, in Coggs *v.* Bernard, 2 Lord Raym. 909, exercises a public employment; and the law charges him 'to carry goods against all events, but acts of God and of the enemies of the King.' Morse *v.* Slue is a direct authority, that, though the contract be to carry to a place out of the kingdom, the liability of the common carrier attaches to them as to one incident, viz. the obligation safely to carry and deliver: and, if so, I cannot see why the other incident, viz. the obligation to accept goods for conveyance, where offered in a reasonable time, and under reasonable circumstances, should not also attach."

By common law, therefore, the carrier's duty to receive, carry, and deliver arose from the law of the state where the transportation originated and followed the carrier through other jurisdictions until performance was complete.

Foreign states might restrict this duty even to the point of forbidding entrance, but in the absence of such laws, and so far as concerned English law, the carrier remained subject to his initial duty until delivery of the goods. This rule prevailed here before the adoption of the Constitution. The conduct of commerce was however, under the conditions of that time, much embarrassed by conflicting and discriminating state legislation, and to avoid impediments, which concerned not the existence but the exercise of the right, Congress was empowered to regulate interstate commerce. Without such provision it was anticipated that,

"Each state or separate confederacy would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences and exclusions which would beget discontent. The habits of intercourse on the basis of equal privileges to which we have been accustomed since the earliest settlement of the country would give a keener edge to these causes of discontent than they would naturally have independent of that circumstance." [1]

[1] Federalist, No. VII.

All this it was intended by the Constitution to prevent,[1] and what the states are thus forbidden to do is equally forbidden to individuals.[2] It was not anticipated that Congress might or could itself restrict the free intercourse which had so long existed, for the purpose of the grant was to establish "an unrestricted intercourse between the states,"[3] and, as has well been said,

> "The whole Constitution in all of its parts looks to the security and free trade in persons and goods between the states of the Union and by this clause prohibits either Congress or the states to interfere with this freedom of intercourse and trade."[4]

The intention of the makers of the Constitution then was to preserve existing rights, freeing their exercise from interference, and the history of commercial regulations by Congress and by the states shows that by this clause no change in origin of fundamental rights was intended.

The federal commercial power, Edmund Randolph said, in the opinion which as first Attorney-General under the Constitution he rendered to President Washington on February 12, 1791, extends to,

> "little more than to establish the forms of commercial intercourse between the states and to keep the prohibitions which the Constitution imposed upon that intercourse undiminished in their operation; that is, to prevent taxes on imports or exports, preferences to one port over another by any regulation of commerce or revenue; and duties upon the entering or clearing of the vessels of one state in the ports of another."

Even Alexander Hamilton, in his opinion upon the same subject rendered to Washington eleven days later, while earnestly defending this provision of the Constitution as a substantial and wide grant of power, nevertheless makes no reference to any consequent limitations upon the authority of the states.

Under the Constitution therefore, as under the Confederation, the right to engage in commerce was derived from state law. This appears very clearly from early action of the states in which the power to give this right in one form or another was distinctly asserted.

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[1] Railroad Co. *v.* Richmond, 19 Wall. 584.

[2] *In re* Debs, 158 U. S. 564; Addyston Pipe & Steel Co. *v.* U. S., 175 U. S. 211.

[3] Federalist, No. XI.

[4] Tucker on Constitution, § 256.

In 1802 the Supreme Court of Connecticut sustained a suit brought against the owner of a stage coach engaged in transportation between Westfield in Massachusetts and Albany in New York, for carrying passengers within the State of Connecticut in violation of a law of that state which granted an exclusive right to the plaintiff to engage in such transportation.[1] In Maryland, Vermont, and Virginia the right to carry passengers had been granted as a monopoly, and it appears that these laws were construed as applying to travel between the states.[2] Furthermore, as showing the view of this matter taken by Congress, it is said that a motion was made in the second Congress to permit stage coaches carrying the mail from state to state to transport passengers also, but that the motion was lost as being in violation of the rights of the states.[3]

The decision of the Supreme Court in Gibbons *v.* Ogden[4] greatly extended the field of national control. From this time until the decision of Cooley *v.* Port Wardens,[5] in 1851, the history of the commerce clause is the history of the struggle between those who, on the one hand, insisted that all federal powers derived therefrom were in their nature exclusive of all state control, and those who, on the other hand, denied that state powers were limited by any implied prohibition contained in this clause.[6]

This discussion was thought to be definitely settled by the case of Cooley *v.* Port Wardens, in a decision which separates the great field over which Congress is given the power of regulation into two smaller fields, — one consisting of matters of a general nature in which federal jurisdiction, whether exercised or not, excludes all state action; the other field consisting of matters of a local nature in which the states may act until superseded by Congress. This rule the court has since said is perhaps the most satisfactory solution which has ever been given of this vexed question,[7] and "may be considered as expressing the final judgment of the court."[8]

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[1] Perrin *v.* Sikes, 1 Day (Conn.) 19.

[2] Maryland: Act of December 21, 1790, chap. 28; Laws of 1785, chap. 14; Act of December 22, 1788, chap. 18; Act of December 28, 1793, chap. 15. Vermont: Act of October 31, 1792. Virginia: Act of December 21, 1790, chap. 62; Act of October 31, 1792, chap. 98.

[3] McMaster's History of the American people, vol. 2, p. 60.

[4] 9 Wheat. 1.

[5] 12 How. 299.

[6] See Prentice & Egan, Commerce Clause of Federal Constitution, pp. 1–42.

[7] Crandall *v.* Nevada, 6 Wall. 35, 42.

[8] Mobile *v.* Kimball, 102 U. S. 691, 702.

The right to engage in interstate commerce and the duty of carriers to receive, carry, and deliver across state lines find, however, no place in this classification. These rights and duties are not merely of local law, for they do not terminate at state lines, but follow the carrier into other jurisdictions until performance is complete. They are therefore not within that class of powers which under the rule of Cooley *v.* Port Wardens the states may exercise by sufferance until their action is superseded by Congress.

On the other hand these rights and duties, although general in character, do not come from federal law, for before the Interstate Commerce Act in 1887 there was no general federal law upon the subject, and even now the federal statutes cover but part of the field and apply only to certain classes of interstate carriers. There is no federal common law.[1] The important facts are, then, that

1. Interstate carriers are now, as they have been, under a duty imposed by law to receive, carry, and deliver across state lines;

2. This law does not now and never did emanate from the federal government. It existed before the establishment of any federal law upon the subject, and is independent of such law, applying to carriers who are not within the operation of the federal statute;

3. The duty is therefore now, as it has been, imposed by state law.

Consideration of the nature of the carrier's duty leads to the same conclusion.

The obligation in question does not arise in different portions from the laws of the several states as the carrier passes through them, for the duty to transport over the route served by the carrier from point of origin in one state to destination in another is "entire and indivisible."[2]

"There is no ground on which to imply a different extent of undertaking in the same contract for the carriage which is beyond the realm from that which is within it . . . the promise or undertaking to be implied is, both on principle and authority, one and indivisible, and applies precisely to the

[1] Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92; Smith *v.* Alabama, 124 U. S. 465; Chicago, etc., Ry. Co. *v.* Solan, 169 U. S. 133; Swift *v.* Phila., etc., Ry. Co. 58 Fed. 858, 64 Fed. 59; Gatton *v.* Railway Co., 95 Ia. 112.

[2] Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397; McDaniel *v.* Railroad Co., 24 Ia. 412, 417; Dyke *v.* Erie Ry. Co., 45 N. Y. 113; Illinois Central R. Co. *v.* Beebe, 174 Ill. 13; Waldron *v.* Canadian Pac. Ry., 22 Wash. 253, 60 Pac. 653; Pittman *v.* Am. Exp. Co., 24 Tex. Civ. Ap. 595, 59 S. W. 949; Ohio & M. R. Co. *v.* Tabor, 98 Ky. 503, 36 S. W. 18.

same extent to a loss occurring in the part of the voyage beyond the realm as to one occurring in the part within the realm."[1]

The carrier and shipper may by contract so restrict the carrier's obligations that instead of one "through" carriage there shall in effect be several undertakings for smaller distances.[2] With these questions we are not now concerned, except to note their existence. Upon a through contract the carrier's obligation is single. This obligation arises when the goods are received or offered for transportation, and damages for failure to carry and deliver at destination may be recovered from the carrier, although the goods may never have left the state of origin.

It has been suggested that the obligation for breach whereof damages are recoverable arises not from state law but from contract; that the law of the state imposes a duty to accept for carriage to any point upon the carrier's line, whether within the state or beyond its boundary, and that when accepted the shipper's rights are dependent upon the contract. It was expressly so held in Nugent *v.* Smith.[3] This theory explains nothing. It needs no decision to establish that "persons may voluntarily contract to do what no legislature would have a right to compel them to do,"[4] but the present question concerns solely the state authority to compel. If the states are without jurisdiction to impose the obligation of carriage beyond their borders, the jurisdiction cannot be acquired by calling the obligation a contract rather than a duty.

Furthermore, as the theory is stated, the carrier is under no obligation to make any contract save that which is imposed by law, and the obligation thus arising exists without his assent. Clearly this is the statement, not of a contractual but of a legal duty, and so it is held.

"To impose upon the carrier the duty of receiving and carrying . . . requires no contract."[5]

A state statute requiring a carrier to furnish a shipper with cars for transportation on its line to other states creates a duty for breach whereof damages may be recovered.[6]

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[1] Nugent *v.* Smith, 1 Com. Pl. Div. 19, 24, 25.

[2] Hughes *v.* Pennsylvania R. Co., 202 Pa. St. 222, 51 Atl. 990; Heiserman *v.* Burlington C. R. & N. R. Co., 63 Ia. 732; Wells *v.* Thomas, 27 Mo. 17.

[3] 1 Com. Pl. Div. 19, 23.

[4] Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 697.

[5] Inman *v.* St. Louis S. W. Ry. Co., 14 Tex. Civ. Ap. 39, 37 S. W. Rep. 37, 41.

[6] Chicago, St. L. & P. Ry. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451.

The duty which rests upon interstate carriers is the same in character as that which rests upon all other carriers. It is "founded on the custom of the realm at common law, and is independent of contract, being imposed by law for the protection of the owner and founded upon public policy and commercial necessity."[1] This duty arises when goods are tendered for transportation and before any actual contract is made.[2] Furthermore the carrier's obligations cannot be referred to its corporate franchises, for the duty is the same although the carrier be not incorporated. Even in the case of corporations the charter does not measure the duty, for in some states a carrier is under greater obligations than those imposed by charter.[3] The result of these authorities appears to be that the duty of an interstate carrier to receive, carry, and deliver goods, and with it the correlative right of the shipper to send goods from one state to another, are both derived from the law of the state from which the goods are sent; that this duty and right are indivisible by state lines and follow the goods from origin to destination. So in the case of individuals the right to travel from one state to another is given by state laws. Under federal decisions these rights are also, to some extent, given by federal law, but they are not dependent upon that law, nor in their broadest extent do they originate there. The right to leave a state comes from its laws, and the commerce clause prevents a state from withdrawing that right.[4]

In the exercise of these rights the laws of other jurisdictions will attach for different purposes. Federal control attaches to secure freedom of interstate commerce, to regulate the amount of rates, to require humane treatment for animals and other purposes.

State laws attach as the goods or passengers cross state lines, to regulate the speed of trains and to make other police regulations, such, for example, as to designate the point at which live stock may be landed in a city,[5] and to define what shall constitute a legal delivery;[6] but in its general character, — that is, in those respects

[1] Chitty on Carriers, 34, 35; Packard *v.* Taylor, 35 Ark. 402; Clyde S. S. Co. *v.* Burrows, 36 Fla. 121, 132.

[2] Bluthenthal *v.* Southern Ry. Co., 84 Fed. 920.

[3] Pullman Co. *v.* Adams, 78 Miss. 814, 30 So. 757; Pullman Co. *v.* Adams, 189 U. S. 420; W. U. Tel. Co. *v.* Eubank, 100 Ky. 591, 38 S. W. 1068.

[4] Conway *v.* Taylor's Ex'or, 1 Black 603.

[5] State *v.* Fagan, 22 La. Ann. 545.

[6] Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 454, citing Pope *v.* Nickerson, 3 Story 465, 484–5; Robertson *v.* Jackson, 2 C. B. 412; Lloyd *v.* Guibert, L. R., 1 Q. B. 115, 126, 6 B. & S. 100, 137.

which are not of merely local importance, the duty to receive, carry, and deliver, the right to collect freight and the extent of liability for loss, — the right and duty of the carrier is founded upon the law of the state by which the duty of carriage was imposed.

In defining the limits of the different jurisdictions in these respects we shall often meet the fundamental difficulty mentioned at the commencement of this article, but the difficulty will be practical, — the principles which should control its determination being fairly well settled.

In the classes of cases to which reference has been made the right to engage in interstate commerce appears to be well recognized as originating in the law of the state in which transportation begins.

The practical application of this rule has most often been involved in cases concerning the carrier's right to restrict his common law liabilities. These cases present a conflict of decisions, arising sometimes from doubt as to the source of the carrier's duties, but more often from failure to identify his liability for loss or damage as part of his fundamental duty, classifying it instead among local matters subject to state control. Notwithstanding the confusion which has thus arisen, the great weight of authority holds that a carrier's liability is measured by the law of the state in which the transportation originated. Facts and necessities have compelled the courts as practical men to reach a conclusion which is in harmony with precedent and with English law. The decisions on this subject are therefore the more worthy of attention.

At common law a carrier's duty of safe carriage was absolute in one respect only, — the carrier could not be relieved of liability for loss caused by his negligence. In other respects he could purchase exemption by contract. In many states this rule has been changed by statute, so that the carrier's right to limit his liability varies in different jurisdictions, a contract which is valid in one state being forbidden in another.

By what law shall these stipulations occurring in bills of lading for interstate transportation be controlled?

It has been shown that historically the English decisions establishing the common law duty of a carrier to receive, carry, and deliver across national boundary lines have been reached by tracing the carrier's duty of insurance, — that is, the courts have held that the duty to carry is part of a larger obligation, of which the duty

of protection is another part, and that both are of the same origin. It has therefore been held in those courts that wherever the duty of insurance has been found the duty of carriage exists also.

It should therefore be easy, having traced the duty of an interstate carrier to receive, carry, and deliver across state lines, to reverse the line of investigation pursued by the English courts and to show that the duty of safe keeping in the extent to which it was imposed when the goods were received accompanies the duty of carriage, and is part of the broad obligation of the carrier.

A carrier comes into a state lawfully charged in another jurisdiction with performance of certain duties. Under the Constitution the state into which he comes cannot withdraw from the carrier the right of free entry in performance of that duty, nor can it discharge the carrier from its primary and essential obligations.[1] It may, as has been said, control all local matters, but the fundamental duty which follows the carrier may not be altered, taxed, burdened, or conditioned.

The state cannot regulate the carrier's charge for interstate transportation, nor can the charge be divided so as to apportion any part to a particular state.[2] How then can the state regulate the fundamental character or amount of the carrier's service, or impose as a result of entering the state, duties of insurance which were not imposed with the duty of carriage? To say that the state may not regulate rates but may determine the service which shall be rendered for a rate fixed by the carrier or regulated by the Interstate Commerce Commission would in effect permit the states to regulate interstate rates, for the amount of the carrier's liability is "indissolubly bound up" with the amount of his charge.[3]

"The presumption is conclusive that if the liability had been assumed on a valuation as great as that now alleged a higher rate of freight would have been charged."[4]

"The carrier's contract does not vary with each jurisdiction in which it may be partly performed, for the service rendered is single, the transportation performed and the liability assumed being the measure on the one side by which the compensation to be paid on the other side is determined."[5]

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[1] Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465.

[2] Wabash R. Co. *v.* Illinois, 118 U. S. 557.

[3] Hart *v.* Pa. R. Co., 112 U. S. 331.

[4] *Ibid.*, 331, 339.

[5] Prentice & Egan, Commerce Clause, p. 167 and cases cited. See Pittman *v.* Express Co., 24 Tex. Civ. Ap. 595, 59 S. W. Rep. 949, where the text and authorities of this book are approved and copied.

In many states this national character of the question has been recognized. In others the carrier's liability has been considered a subject of local regulation, and so seven different answers have been given to the question as to the law which shall control the carrier's liability upon his contract of carriage. It is said,

1. That the carrier's liability, being a matter which concerns more states than one, is subject to federal control alone, and that all state laws on the subject as applied to interstate commerce are void.

2. That the contract is governed by the law of the state from which the carrier derives its corporate franchise.

3. By the law of the state in which the contract was made, whether partly performed there or not.

4. By the law of the state where breach occurs.

5. By the law of the state in which suit is brought.

6. By the law of any state in which it is to be partly performed with reference to which the parties intended to contract.

7. By the law of the state which imposed the duty to receive, carry, and deliver.

1. The rule that a state may not by statute regulate the extent of a carrier's liability upon contracts for interstate transportation was announced in Western Union Tel. Co. *v.* Burgess:

"One great object of delegating to the federal government the exclusive power over the subject, was that the rules and regulations established by law for the government and control of those engaged in commerce between the states should be uniform. This object would be defeated if each state were permitted by legislation to prescribe what stipulations may or what may not be entered into for their protection against litigation, by those employed in carrying passengers or freight between the states, and those engaged in transmitting messages by telegraph from one state to another. Such legislation, in the opinion of this court, imposes restrictions and burdens upon interstate commerce in conflict with the federal constitution and must therefore be held to be void so far as it applies to messages sent into and received from another state."[1]

Such considerations greatly influenced the court in Missouri Pacific Ry. Co. *v.* Sherwood,[2] Texas & Pac. Railway Co. *v.* Richmond,[3] Otis Co. *v.* Mo. Pac. Co.,[4] and other cases.

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[1] W. U. Tel. Co. *v.* Burgess, 43 S. W. 1033.
[2] 84 Tex. 125.
[3] 61 S. W. 410, reversed in 94 Tex. 571; 63 S. W. 619.
[4] 112 Mo. 622.

This view, which is correct in considering the carrier's liability an essential part of his single and indivisible service, nevertheless overlooks the fact that the carrier's liability, whatever it is, results from the law of some state. These cases are inconsistent with all other decisions on the subject, which, however discordant, agree in holding that the subject is not beyond state jurisdiction. For all these reasons this rule is now abandoned by the courts which first announced it.[1]

2. In some cases it has been argued that when by the law of the state of incorporation carriers are forbidden to contract for limitation of their common law liability, this statutory provision should be read into the charter of the company so that it would be without power to limit its liability by such contract in any jurisdiction. This question was stated but not decided by the Federal Court of Appeals in Thomas *v.* Lancaster Mills,[2] the decision resting on other grounds. The trial court had held that the carrier's liability was not thus measured.[3] To the same effect is Tecumseh Mills *v.* Louisville & N. R. Co.[4] In Brown *v.* Camden & A. R. Company,[5] a contrary conclusion was reached, and it was held that a carrier's liability resulting from neglect in the exercise of its franchise was to be determined according to the law of the state by which the franchise was granted. Another doctrine is now established in Pennsylvania,[6] and the Brown case may be considered as overruled.

The theory has little merit, and the case announcing it has been mentioned by the Supreme Court of the United States without approval.[7] No reason appears why this particular provision of statutory law should be read into the charter rather than many others. Nor if such a carrier should be engaged in domestic commerce within a state other than that of its incorporation, and where contract limitation was not forbidden, does it appear that any good purpose would be served by compelling it to assume liabilities not imposed upon its competitors. At best the rule would have but partial operation and would offer no solution for those cases where

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[1] Pittman *v.* Am. Ex. Co., 24 Tex. Civ. Ap. 595, 59 S. W. 949.
[2] 71 Fed. 481.
[3] S. C. *sub nom.* Thomas *v.* Wabash R. Co., 63 Fed. 200.
[4] 108 Ky. 572; 57 S. W. 9.
[5] 83 Pa. 316.
[6] Hughes *v.* Pa. R. Co., 202 Pa. St. 222, 51 Atl. 990.
[7] 129 U. S. 457, 458.

a carrier organized in a state where limitation of liability was permitted, engaged in commerce in other states.

3. In a number of cases the suggestion is made that a contract void where made is void everywhere, and that this rule would apply to contracts limiting a carrier's liability, although the shipment was to be made wholly outside the state of contract. It may be inferred that the court held this view in McDaniel *v.* Railway Co.,[1] but the case did not so decide, and no reason appears for so great a departure from the ordinary principles of law. Contracts which are good by the law of the place of performance are not rendered illegal because signed in a jurisdiction where they could not be performed.[2]

4. Some cases have held that the validity and effect of such contracts are to be determined by the law of the state where the loss or injury occurs:

"Where a contract containing a stipulation limiting liability for negligence, is made in one state, but with a view to its performance by transportation through or into one or more other states, we see no reason why it should not be construed in accordance with the law of the state, where its negligent breach causing injury occurs. If such a contract comes under construction, in a state like Pennsylvania whose policy prohibits such exemption, and the injury has occurred in a state where the contract is valid, the stipulation will be enforced as in Forepaugh *v.* Railroad Co., 128 Pa. 217, and in Fairchild *v.* Railroad Co., 148 Pa. 527. But if the injury has taken place within its limits, it will declare the contract null and void, as in Burnett *v.* Railroad Co., 176 Pa. 45." [3]

It is not to be denied that there are phrases in opinions of the Supreme Court of the United States which taken alone seem to support this view. Thus in Smith *v.* Alabama,[4] it is said:

"A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the laws of the state for acts of non-feasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the state in its courts." [5]

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[1] 24 Ia. 412.

[2] Forepaugh *v.* Delaware, etc., Ry. Co., 128 Pa. St. 217; Atchison, T. & S. F. Ry. *v.* Grant, 6 Tex. Civ. Ap. 674, 28 S. W. 98.

[3] Hughes *v.* Pa. R. Co., 202 Pa. St. 222, 51 Atl 990, citing Barter *v.* Wheeler, 49 N. H. 9; Railroad Co. *v.* Sheppard, 56 Ohio St. 69, and Story, Cont. § 655.

[4] 124 U. S. 476.

[5] See Chicago, M. & St. P. Ry. *v.* Solan, 169 U. S. 133, 137.

The law of the state of destination does not impose the duty of delivery, but it can, as has been said, define what shall constitute a legal delivery. The statement that if a carrier fail to deliver "at the right time or place he is liable in an action for damages under the laws of the state in its courts" is therefore strictly in accordance with principle. This power to regulate delivery, broadly as it is sometimes announced, is in fact much restricted, for, as the court said in Wabash R. R. *v.* Illinois,[1]

"If each one of the states through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation as an element of interstate commerce might be too oppressive to be submitted to."

Many other phrases like that quoted from Smith *v.* Alabama might be found, but notwithstanding these general expressions, the rule of the federal Supreme Court is well settled that the contract of carriage in its fundamental character is a unit — "a single fare for a single service" — and that the carrier's liability does not vary in different jurisdictions. It is also the English rule that the carrier's liability "applies precisely to the same extent to a loss occurring in the part of the voyage beyond the realm as to one occurring in the part within the realm."[2] The case of Barter *v.* Wheeler,[3] which the Supreme Court of Pennsylvania cites to support its decision, is of doubtful authority in the state where rendered,[4] and was disapproved by the Supreme Court of the United States in Liverpool Steam Co. *v.* Phenix Ins. Co.[5] On the other hand, cases which establish a different rule, inconsistent with the doctrine which judges the carrier's liability according to the law of the place of breach, have, as will be seen, had the steady support of the federal Supreme Court.

"It would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states, which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or

[1] 118 U. S. 557, 572.
[2] Nugent *v.* Smith, 1 Com. Pl. Div. 19, 23.
[3] 49 N. H. 9, 29.
[4] Gray *v.* Jackson, 51 N. H. 9, 39.
[5] 129 U. S. 397, 458.

taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."[1]

5. The theory that the validity of the stipulations limiting a carrier's liability are to be determined by the law of the forum prevails only in Nebraska, and is supported, as the Supreme Court of that state admits, "by the use of adjudicated cases not treating of or involving the liability of common carriers." The case in which the doctrine was announced is that of Chicago B. & Q. R. Co. *v.* Gardiner,[2] an action brought to recover for damage to property shipped from Illinois into Nebraska and injured somewhere on the road. In the bill of lading the property was valued at $100 and liability limited to that sum. The court, assuming this limitation to be valid in Illinois, refused nevertheless to support it in Nebraska, saying:

"As a general rule the proposition may be accepted as correct that where parties, in good faith, have entered into a contract valid and binding in the state where made, it will be enforced in another state. This enforcement is a matter of comity, however, and not of absolute right. As was said by Chief Justice Taney in Bank *v.* Earle, 13 Pet. 519, 'the comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and it is inadmissible when contrary to its policy, or prejudicial to its interests.'"

The limitation in question was considered contrary to the policy of Nebraska, and the court refused therefore to support it.

The argument is defective, for no question of international comity is involved. "In the matter of interstate commerce," as Mr. Justice Bradley said, "the United States are but one country."[3]

6. In many instances language has been used which seems to indicate that in determining the law by which contracts for interstate shipment should be judged, reference will be had to the intention of the parties. Thus in the leading case, Liverpool Steam Co. *v.* Phenix Ins. Co.,[4] a case involving foreign commerce, the court said:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence of authority, the general rule, that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties

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[1] Wabash R. Co. *v.* Illinois, 118 U. S. 557, 573.
[2] 51 Neb. 70; 70 N. W. 508.
[3] Robbins *v.* Taxing District, 120 U. S. 489, 494.
[4] 129 U. S. 397, 458.

at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties when entering into the contract clearly manifest a mutual intention that it shall be governed by the law of some other country."

This rule, whose broad language has been often quoted, does not mean that under any circumstances the parties to a contract of affreightment may at will select the law of any state or country as the law which shall control the contract, but that they are limited to the law of some state in which the contract is to be partly performed. Even when thus limited the rule cannot be generally applied, for if a contract is an American contract a stipulation in the bill of lading that it shall be governed by foreign law is one which the courts refuse to enforce.[1]

The rule does not offer a satisfactory guide in cases of interstate commerce, for

(*a*) If a contract be in fact a contract of one state, the parties cannot by stipulation make it subject to any other law. In matters where they are free to contract they may arrange as they please, but this liberty cannot be so used as to enable them in a contract which is actually subject to the law of a particular state to escape the positive duties or obligations lawfully imposed by that state.

(*b*) A rule of construction by which, in seeking judicially to determine the intent of the parties, one construction would be given to a contract of shipment from a particular place when made by a citizen of one state, and another construction when made from the same place by a citizen of another state, would result in confusion, and the same would be true if other indicia of intention were placed above that of residence of the parties.

(*c*) Lastly, the search for intent is unsatisfactory, for, as the court said in Grand *v.* Livingston,[2] the question

"can hardly be said to involve the actual mental operations of the parties, for, as a matter of fact, they probably did not stop to consider what was the

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[1] Knott *v.* Botany Mills, 179 U. S. 69; Botany Mills *v.* Knott, 82 Fed. 471; The Glenmavis, 69 Fed. 472; The Iowa, 50 Fed. 561; The Trinacria, 42 Fed. 863; Lewisohn *v.* Nat. S. S. Co., 56 Fed. 602; The Hugo, 57 Fed. 403. See also Campania La Flecha *v.* Brauer, 168 U. S. 104, 118, where the subject was mentioned but no decisive opinion expressed.

[2] 4 App. Div. 589, 595, affirmed 158 N. Y. 688.

legal effect of their agreement, or whether there was any diversity in the law of the two states, and therefore, when we speak of the 'question of intent' we are making use of what may perhaps be termed a 'legal fiction.'"

7. The rule which appears to have the support of the Supreme Court of the United States and which is favored also by the weight of authority in state and lower federal courts, is that stipulations limiting a carrier's liability in contracts for interstate transportation are governed by the law of the state imposing the duty of carriage and care.

The question whether or not a duty may be waived depends upon the nature of the duty itself, and this in turn depends solely upon the law which established the duty.

This, it is believed, will appear from the decisions upon the subject. In Dyke *v.* Erie Railway,[1] the liability of a railway company to a passenger travelling from place to place in New York, but injured in Pennsylvania, was considered. Under the Pennsylvania law damages were limited. By the New York law no such statutory limit was imposed. It was held that the New York law controlled the case. This judgment was cited with approval by the Supreme Court of the United States in Liverpool S. Co. *v.* Phenix Ins. Co.[2] Suits to recover damages for personal injury are controlled by considerations which do not apply to carriers of goods. Notwithstanding this there appears to be a tendency to establish the same rule in both classes of cases.

Pennsylvania Co. *v.* Fairchild [3] was an action to recover damages for loss of goods which were shipped from Indiana under a bill of lading which exempted the carrier from liability for loss by fire, and were burned in Illinois. This stipulation was valid in the former state, but forbidden in the latter. The law of Indiana was applied and the contract upheld. This case also was approved by the Supreme Court of the United States,[4] and has been followed in Illinois by the recent decision of Illinois Central R. Co. *v.* Beebe.[5]

Thomas *v.* Railway Co.[6] was a similar case brought to recover for the loss of goods consigned from Memphis to a point in Massachusetts and burned in Illinois. Under the law of Tennessee the stipulation limiting the liability of the carrier was valid, and this stipulation was upheld. The judgment was reversed by the Cir-

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[1] 45 N. Y. 113.
[2] 129 U. S. 397, 456.
[3] 69 Ill. 260.
[4] 129 U. S. 458.
[5] 174 Ill. 13, affirming 69 Ill. App. 363.
[6] 63 Fed. 200.

cuit Court of Appeals, but on grounds which do not affect the present question.[1]

In Grand *v.* Livingston,[2] a New York court held that stipulations limiting the carrier's liability for a shipment from Boston to Buffalo are to be judged by Massachusetts law, and in Brockway *v.* American Express Co.[3] the Supreme Court of Massachusetts held that a contract for shipment from Chicago to Boston was governed by the law of Illinois. In many other cases there have been similar judgments.[4]

In the recent case of Richmond, etc., R. Co. *v.* Patterson Tobacco Co.[5] it appeared that the Tobacco Company had shipped goods from Virginia to Louisiana by the Richmond & Alleghany Railroad under a through bill of lading which limited the carrier's liability to his own line. The goods were lost after leaving the possession of the Richmond Railroad. A statute of Virginia provides that such limitations upon a carrier's liability are ineffectual unless made by contract signed by the owner of the goods, which was not done in this case. It was held by the Supreme Court of Virginia that the statute referred to was valid as applied to interstate shipments, for " it declares what shall be the implied liability upon the carrier who receives goods for shipment in the absence of a special contract." This judgment was affirmed by the Supreme Court of the United States.

From this review of authorities it appears that although there is a conflict in the decisions which relate to the liability of a common carrier in interstate commerce, nevertheless the weight of authority indicates that his fundamental duties, together with the right to engage in commerce, arise from and are to be judged by the law of the state in which the transportation originates.

Every case involving the right of an interstate carrier to restrict

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[1] Thomas *v.* Lancaster Mills, 71 Fed. 481.

[2] 4 App. Div. 589, affirmed 158 N. Y. 688.

[3] 171 Mass. 158, 50 N. E. 626.

[4] Central Ry. *v.* Kavanaugh, 92 Fed. 56; Meuer *v.* Chicago, etc., Railway Co., 11 S. D. 94, 75 N. W. 823; Meuer *v.* Chicago, etc., Railway Co., 5 S. D. 568, 59 N. W. 945; Hazel *v.* Chicago & St. P. Ry. Co., 82 Ia. 477; Reed *v.* Western Union Tel. Co., 135 Mo. 661; Palmer *v.* Atchison, etc., Ry. Co., 101 Cal. 187, 35 Pac. 630; St. Joseph, etc., Ry. *v.* Palmer, 38 Neb. 463, 56 N. W. 957; Western, etc., Ry. *v.* Exposition Mills, 81 Ga. 522; Talbott *v.* Merchants Des. Trans. Co., 41 Ia. 247; Cantu *v.* Bennett, 39 Tex. 303; Ryan *v.* Missouri K. & T. Ry., 65 Tex. 13; Mexican Nat. Ry. *v.* Ware, 60 S W. 343; Pittman *v.* Am. Ex. Co., 24 Tex. Civ. Ap. 595, 59 S. W. 949; Southern Pac. Co. *v.* Anderson, 26 Tex. Civ. Ap. 518, 63 S. W. 1023.

[5] 169 U. S. 311, 92 Va. 670.

its liability under the law of the state from which it operates, appears to involve a federal question, and therefore, if the view here advanced be correct, it is greatly to be desired that this question be presented to the Supreme Court for final determination. As that court has twice remarked of another phase of this question,

"It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country." [1]

From another aspect the importance of a judicial determination of these questions is still more apparent.

The claim that Congress may so regulate interstate commerce as in effect to control domestic commerce, — may even exclude from interstate commerce persons or property save such as conform to tests which the federal government may at will impose, invites examination into the source of the federal powers.

The regulation of domestic commerce, of

"all of these delicate, multiform, and vital interests — interests which in their nature are and must be, local in all the details of their successful management,"

is beyond federal power,[2] and it is to be hoped that no extension of this power may be authorized which will by indirection place domestic commerce within national control.

"In proportion as the General Government encroaches upon the rights of the states, in the same proportion does it impair its own power and detract from its ability to fulfil the purposes of its creation." [3]

E. Parmalee Prentice.

35 Wall Street, New York.

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[1] Railroad Co. *v.* Mfg. Co., 16 Wall. 318, 324; Myrick *v.* Railroad Co., 107 U. S. 102, 106.

[2] Kidd *v.* Pearson, 128 U. S. 1, 21.

[3] Jackson, Second Inaugural Address.

THE NORTHERN SECURITIES CASE UNDER A NEW ASPECT.

MR. J. L. THORNDIKE, of the Boston Bar, has published, through Messrs. Little, Brown & Co., a review of the decision of the United States Circuit Court of Appeals in the Northern Securities case, which deserves the most careful study. The chief object of Mr. Thorndike's review is to show that the acquisition by the Northern Securities Company of a majority of the shares in the Northern Pacific and Great Northern Railway Companies is neither a restraint of trade, under section 1 of the Sherman Anti-trust Act, nor a monopoly, under section 2 of the same Act.

In order to show that it is not a restraint of trade, Mr. Thorndike makes the following points: 1. As the Act does not at all define "restraint of trade," Congress must be held to have used that term in its legal sense. 2. Restraint of trade means in law any interference by legal means, as distinguished from physical force or violence, with freedom of trade, *i. e.*, with the right which every person has to engage in any lawful trade, and to carry on that trade in any lawful manner that he sees fit. 3. Practically, the only way in which a private person, whether natural or artificial, can thus interfere with the freedom of trade is by means of a contract, *i. e.*, by procuring another person to bind himself by contract not to carry on a particular trade, or to carry it on only subject to certain prescribed restrictions; and accordingly, in the three cases[1]

[1] U. S. *v.* Trans-Missouri Freight Association, 166 U. S. 290; U. S. *v.* Joint Traffic Association, 171 U. S. 505; Addyston Pipe and Steel Co. *v.* U. S., 175 U. S. 211. In the second of these cases, counsel for the defendants contended (pp. 518–519), and the court assumed (pp. 575–578), that whether a contract is in restraint of trade depends upon the effect which it will have upon trade and commerce. It is submitted, however, that the true test is much more simple, namely, the effect that the contract has upon the person bound by it, *i. e.*, whether it deprives him of freedom in carrying on his trade, or any lawful trade, in such manner as he shall see fit. If it has this effect to an unreasonable extent, the common law raises a conclusive presumption that it will be injurious to trade, and if it does this to any extent, it is, as the court holds, prohibited by the statute in question.

Assuming, however, that the statute had used the words "in restraint of competition" instead of the words "in restraint of trade," it would still be true that there must be "restraint," and that there cannot be when there is no contract of any kind, and every person concerned is left perfectly free.

in which the Supreme Court has held that there was a restraint of trade, within section 1 of the Act in question, there was such a contract as has just been described. 4. In the Northern Securities Case, no contract of any kind was entered into by any one, and no restraint was imposed upon any one. 5. The Circuit Court of Appeals has made the mistake of assuming that to destroy or lessen the motive for competition between two or more persons is to restrain trade, whereas it is only in so far as trade is free that the presence or absence of a motive for competition has any operation. 6. The court having said that all competition between the two railway companies would be as completely destroyed by what had been done as if the two railways had been completely consolidated, Mr. Thorndike answers that the complete consolidation of the two railways would be no violation of the Act in question; that the legal obstacles in the way of the consolidation of two or more railways are entirely local, the co-operation of the State or States through which such railways run being indispensable. 7. The law-giver and the court are at complete cross-purposes, the former saying nothing about competition, and the latter saying nothing about restraint of trade.

Mr. Thorndike says the ownership by the Northern Securities Company of a majority of the shares in each of the two railway companies does not constitute a monopoly in the carrying of passengers or goods, as it does not vest in the Northern Securities Company, or in either of the two railway companies, or in any one else, any exclusive right to carry passengers or goods, an exclusive right to carry on some trade being of the essence of every monopoly. Accordingly, the only perfect monopolies are those created by grants from the State or, in England, from the Crown, as the State or the Crown alone can vest in one person the exclusive right to carry on any given trade by excluding all other persons. Such monopolies, created by the Crown, were formerly very common in England, and became an intolerable grievance; and accordingly they were prohibited by the Statute of Monopolies,[1] except in the cases of authors and inventors, as long ago as the time of Lord Coke. It may be observed, however, that all those trades which can be carried on only by the authority of the State (for example, constructing or operating railways) are monopolies, in a qualified sense, in those to whom the state has granted authority to carry

[1] 21 Jac. I. c. 3.

them on, so long as the authority is granted in each case separately, and only after a judicial examination of the merits of the application; but they cease to be monopolies in any legal sense when the State throws them open to every one, merely prescribing the terms and conditions upon which they may be carried on.

It is scarcely necessary to say, however, that monopolies created by the State itself are not those aimed at by section 2 of the Act in question. What then are the monopolies at which the Act aims? Mr. Thorndike says, as we understand him, they can only be such monopolies as are created by contract, as where one person excludes others from the right of competing with him in his trade by procuring them to bind themselves by contract not to carry on that kind of trade; and he thus makes the terms "monopoly" and "restraint of trade," as used in the Act, synonymous, and he thinks this use of the term "monopoly" is justified by the fact that the reason generally given for holding contracts in restraint of trade to be invalid, is that such contracts tend to create monopolies. It must be confessed, however, that such a use of the term, "monopoly," is not common, and Mr. Thorndike can scarcely claim that the Act was intended to be limited to such cases, especially as such a view of the Act would render section 2 useless. Still, if a law-giver prohibits a thing which is found to have no existence, he cannot expect, and presumably would not wish, to have his command enforced against something else which is not within the terms of the prohibition; and this seems to be the situation of section 2 of the Act.

There is, indeed, a species of natural monopoly, as it may be termed, though Mr. Thorndike does not advert to it, as where a person owns mines, the product of which is of such a quality that the product of no other mines can successfully compete with it for many purposes (for example, anthracite coal), or the product of which is so situated in respect to location that the product of no other mines can compete with it except after paying heavy expenses for transportation. Such a monopoly, however, is a mere incident of the ownership of land, and cannot well be prohibited so long as private ownership of land is lawful. It is also true that "monopoly" is one of the vituperative epithets frequently hurled at things commonly called trusts, consolidations, or amalgamations, but Mr. Thorndike has abundantly shown that none of these things have any more of the elements of monopoly than has a partnership which has been formed among several tradesmen for

the purpose of taking over the business of each, and that such a partnership differs from the greatest of the so-called trusts only in size. If, therefore, the latter is held to be a monopoly within section 2 of the Act, the former must be so held also; for that section declares that "*every person* who shall monopolize," etc., "shall be deemed guilty of a misdemeanor," etc.; and the Supreme Court has held[1] that section 1 extends to railways solely by virtue of the words "*every* contract, combination," etc. Mr. Thorndike has also shown that such a partnership as has just been described has no more of the elements of a monopoly than would a partnership formed with the same amount of capital and between the same number of persons, no one of whom had previously been engaged in trade, and each of whom had contributed the agreed amount of capital in cash, and that a complete consolidation of the two railways would have no more of the elements of monopoly than would a single railway company which had built and operated both lines of railway.

C. C. Langdell.

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[1] U. S. *v.* Trans-Missouri Freight Association, *supra.*

HARVARD LAW REVIEW.

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SINCE the REVIEW is now publishing articles on what are perhaps exciting public questions, it seems wise to remind its readers of the continued custom of the REVIEW to have no policy in such matters. It accepts for publication any article on a question of law which is satisfactory in form and which its editor deems a material addition to the subject discussed, regardless of the source from which the article may come, or the results which might follow from the adoption of its contentions.

THE LAW SCHOOL. — The Law School as usual opened with a number of changes in the curriculum, the continued absence of Professor Strobel, and the departure of Assistant Professor Westengard for Siam, having made considerable rearrangement necessary. Professor Beale will give the course in Property II., and this course, with Conflict of Laws, he will complete in April, going to Chicago for the last quarter of the term. Professor Wambaugh has taken Property I., and will discontinue for this year his course on Quasi-Contracts. The work in the second year course on Jurisprudence and Procedure in Equity, shared last year by Professor Beale, will be this year entirely undertaken by Dean Ames, and the Dean's place in third year Equity will be filled by Mr. Wallace B. Donham, LL.B., 1901. The case book used will be Dean Ames' second volume of Equity Cases, which is now in course of preparation. A new book is also to be used in first year Contracts, Professor Williston having now completed the first volume of his new cases on that subject, there being a second to follow. The course will be given to two sections of the class by Professor Williston and Assistant Professor Wyman. In addition to his courses on Evidence and Constitutional Law, Professor Gray assumes again his former course in third year Property, and Mr. Frederick Green, LL.B., 1893, whose father,

Mr. Nicholas St. John Green, lectured on Torts and Criminal Law in the Law School in the early seventies, will undertake the course in Admiralty. A new course, treating of The Administration of Law by Public Officers, is announced as an extra course, by Assistant Professor Wyman.

The enrollment in the school on October fifteenth was considerably greater than at the same time last year. Complete statistics will, as usual, appear in the December number.

Implied Promise not to Prevent Performance of a Contract. — Where under the terms of a contract performance on the one side is to be given in exchange for performance on the other, one contracting party is under no legal duty to perform where the other party has not performed or is not ready to perform, according to the terms of the agreement. This principle, formerly expressed in terms of implied conditions,[1] is accepted law in every case where the part unperformed by the plaintiff goes to the essence of the contract.[2]

When one party to a contract prevents the other from performing his part, the latter therefore has no remedy under the express contract. It is true that full performance of the plaintiff's promise may be waived by the defendant, but evidently an intention to waive performance is not shown by an act preventing the other party from furnishing a substantial part of the *quid pro quo*. The intention is rather to repudiate the contract. If a waiver is implied, the party at fault is forced to perform without receiving the *quid pro quo*, or to suffer damages if he refuses to perform which must be measured by the value of the promise which it was his legal duty to perform. To secure justice, therefore, by holding the defendant liable for the loss the plaintiff has sustained, a promise not to prevent performance is implied, the damages for breach of which are the value of the contract to the plaintiff.[3] Formerly, where prevention of performance was the cause of action, and the breach declared on was of the express promise, the plaintiff's case was dismissed.[4] In more modern times the pleading is not required to be so accurate, and thus the distinction between breach of the express and of the implied promise is not always kept in mind.[5]

In a recent Massachusetts case the failure of the court to mark the distinction just referred to resulted in the dismissal of the plaintiff's action. A fraternal beneficiary association passed a by-law limiting the amount payable upon all existing policies of life insurance to $2000 and refused to accept premiums upon a larger basis. The plaintiff, who held a $5000 policy, sued the association for breach of contract. *Porter* v. *American Legion of Honor*, 183 Mass. 326. Here the time for performance on the part of the company of its express promise, *i. e.* to pay the beneficiary $5000 at the death of the insured, has not arrived, and by Massachusetts law no action lies for repudiation of the express contract.[6] But the defendant association has refused to accept, and the plaintiff therefore has not paid assessments at the rate called for by a $5000 policy. Accordingly on the express contract

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[1] *Cf.* Kingston *v.* Preston, Lofft 194.

[2] Poussard *v.* Spiers, 1 Q. B. D. 410; Cadwell *v.* Blake, 6 Gray (Mass.) 402.

[3] United States *v.* Behan, 110 U. S. 338, 346; Weed *v.* Burt, 78 N. Y. 191; Paige *v.* Barrett, 151 Mass. 67.

[4] Shales *v.* Seignoret, 1 Ld. Raym. 440.

[5] Laird *v.* Pim, 7 M. & W. 474.

[6] Daniels *v.* Newton, 114 Mass. 530.

the plaintiff can never recover damages unless that refusal is held to be a waiver, — obviously contrary to intention and imposing on the defendant a liability greater than justice demands. There should therefore be recovery for breach of the implied promise not to prevent performance. Such is the result reached in those cases where the beneficiary is allowed to recover as damages the value of the policy less the unpaid premiums,[7] for the damages for breach of the express promise to pay the amount of the policy would be that sum and interest. This breach of the implied promise in the present case happens to be immediate, and therefore the action should be maintained.

Unfortunately the court disregarded these considerations, and on the ground that Massachusetts does not adopt the doctrine of anticipatory breach gave judgment for the defendant. It seems to follow from this case that there is now in Massachusetts no recovery for breach of the implied promise not to prevent performance. It will be interesting to observe whether the court will adhere to this rule when the question is next presented to it. A. L.

Innkeeper's Liability to Guests. — An early English case,[1] involving the question of an innkeeper's liability for the loss of his guests' goods, has, through different interpretations of its language, caused a striking diversity of decision. In England after some uncertainty it was laid down that an innkeeper is only *prima facie* liable. This might be rebutted by showing that the loss occurred without his own fault or that of his servants.[2] This is now law in a number of jurisdictions in the United States.[3] The view was, however, finally overruled in England.[4] It is now the English law that, unless the loss was caused by the act of God, the public enemy, or by the fault of the guest, an innkeeper is liable as an insurer. This view is adopted by a slight preponderance of authority in the United States.[5]

An insurer's liability should obviously not be imposed upon any one in charge of the property of another without strong reason. The rule in the case of innkeepers was originally established on grounds of public policy. At that time the country was infested with robbers. Easy opportunities and the transient character of their guests offered strong temptation to innkeepers to collude with criminals in depriving them of their property. This strict rule was therefore dictated by necessity. It is argued in some of the cases that the reason for the rule no longer exists. But, although our country is no longer infested with robbers, yet innkeepers may still collude with others for fraud and theft. This is especially probable in the cheaper hotels of the cities. Guests are comparatively helpless and must rely greatly upon the honesty of the innkeepers. The courts would, therefore, seem to be justified in applying the insurer's liability rule in the case of the disappearance of a guest's property.

The reason of the rule does not apply, however, where the goods are

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[7] Guetzkow *v.* Mich. Mut. Life Ins. Co., 105 Wis. 448; Natl. Mut. Ins. Co. *v.* Home Benefit Society, 181 Pa. St. 443.

[1] Calye's Case, 8 Co. 32.
[2] Dawson *v.* Chamney, 5 Q. B. 164.
[3] Metcalf *v.* Hess, 14 Ill. 129.
[4] Morgan *v.* Ravey, 6 H. & N. 265.
[5] Sibley *v.* Aldrich, 33 N. H. 553.

destroyed by some obvious operation of nature, as by fire. Accordingly, Michigan [6] and Vermont [7] have adopted an intermediate rule. An insurer's liability is imposed in cases of disappearance of the guest's property, but only a *prima facie* liability where the loss is caused by a natural casualty. A recent Minnesota case, involving the destruction of a guest's property by fire, in effect adopts this rule, qualifying the language of a previous decision [8] in that state. *Johnson* v. *Chadbourn Finance Co.*, 94 N. W. Rep. 874. This rule seems to attain justice without sacrificing the restraining influence of the insurer's liability. In view of the diversity of decisions, policy may well determine what rule should be adopted. The principal case in applying the intermediate rule carefully excludes cases of theft, and thus obtains a very happy adaptation of justice to the needs of the case.

Forfeiture in Equity. — In cases of contracts for the sale of land where time is stipulated to be of the essence and where the vendee agrees in case of default to forfeit payments already made, courts of equity are not in accord as to what relief, if any, should be given a defaulting vendee. The rule in England is on payment of the balance due [1] to grant specific performance to the vendee. These stipulations as to time and forfeiture are held to be inserted merely as additional security for the payment of money. If the vendor is given his principal, interest, and costs, he has, therefore, no right to complain. In certain American jurisdictions, for instance Wisconsin, the courts are more favorable to the vendor. He may either suffer specific performance or refund the payments already made.[2] In California, finally, and some few other states, equity affords the vendee no protection whatever.[3] Here a vendor may bring ejectment against a vendee in possession without returning previous payments. *Williams* v. *Long*, 72 Pac. Rep. 911 (Cal.). The argument is, that, in the absence of fraud, accident, or mistake, justice does not require that a man be relieved from the effect of agreements he knowingly made and negligently failed to observe.

It would seem that no one of these rules will in its application be universally equitable. When a court is convinced that a decree of specific performance on payment of principal, interest, and costs will give the vendor all he really bargained for, the decree should issue. But if circumstances have so changed that the results contemplated by the parties cannot be brought about, it is equally obvious that the decree should be denied. Nor is it always fair to force the vendor to refund payments he has received. He may have suffered damages even in excess of these payments. Here it would seem that the vendee should be refunded only the excess of payments, if any there be, over the real damage the vendor has suffered. The true solution would therefore seem to vary in each particular case and not to lie in any hard and fast rule. The vendee should in every case be accorded the fullest measure of relief consistent with leaving the vendor

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[6] Cutler *v.* Bonney, 30 Mich. 259.
[7] Merrit *v.* Claghorn, 23 Vt. 177.
[8] Lusk *v.* Belote, 22 Minn. 468.

[1] Vernon *v.* Stephens, 2 P. W. 66.
[2] See Hall *v.* Delaplaine, 5 Wisc. 206.
[3] Glock *v.* Howard & Wilson Colony Co., 123 Cal. 1.

in as good a position as the one for which he really bargained. But where relief can be given only at the vendor's expense, the vendee should suffer the result of his default.

THE FICTION OF CORPORATE ENTITY. — The Northern Securities decision,[1] in going behind the corporation to reach the incorporators, marks but a slight advance in the modern tendency to restrict the application of the theory of a "corporate entity." The way had been cleared for it by decisions[2] declaring that an act of all the stockholders tending to control a corporation or affect the transaction of its business — such as the transfer of all their shares to a "trust" — is the act of the corporation. In saying that the act of a corporation is the act of its stockholders, then, the Circuit Court of Appeals was but declaring the converse of this proposition. But a distinct advance in the direction of narrowing the practical scope of the separate entity theory is made in a recent case. A membership corporation sued a labor union which had declared a strike against it, for an injunction against prospective acts of violence which threatened to injure the businesses of the individual members of the corporation. No injury to corporate property was threatened; yet the court granted the injunction. *Horseshoers' Protect. Ass'n* v. *Quinlivan*, 83 N. Y. App. Div. 459. The case is in advance of the New York and Ohio cases above cited, because in them the action of the stockholders complained of was held to be, in its essence, corporate action, while here the damage was about to be suffered by the members with respect to their individual interests, the corporate business remaining unaffected. It is important to notice, however, that the members were about to suffer merely because of their membership. Identical in principle are the cases in which at the suit of a corporation the Supreme Court of the United States enjoined the levy of an unlawful tax on the shares of its stockholders.[3]

"A fiction of law shall never be contradicted," said Lord Mansfield,[4] "so as to defeat the end for which it was invented; but for every other purpose it may be contradicted." The "legal" entity, distinct from its stockholders, which has been ascribed to a corporation, is by the very force of the term a fiction "of law." And convenience — the convenience of the courts in distinguishing between the rights and liabilities, as individuals and as a body, of the natural persons who compose the corporation — seems, in brief, to have been the end for which it was introduced. At common law a failure to so distinguish would involve the courts in difficulties. For instance, in the principal case money damages recovered would be corporate assets, though the members might have suffered unequal injuries; or, if not corporate assets, how should they be distributed? For a court of law, then, to discard the idea of a legal entity might well defeat the end for which it was invented. But in Equity, since the relief obtained is the enforcement of action by third parties or the restraint of such action, the redress enures at once to each stockholder, and is exactly proportionate to what would be

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[1] United States *v.* Northern Securities Co., 120 Fed. Rep. 721.

[2] People *v.* North River Sugar Refining Co., 121 N. Y. 582; People *v.* Standard Oil Co., 49 Oh. St. 137.

[3] Cummings *v.* Nat. Bk., 101 U. S. 153; *contra*, Waseca Cty. Bk. *v.* McKenna, 32 Minn. 468.

[4] Johnson *v.* Smith, 2 Burr. 962.

his present or prospective loss, if the action were not enforced or restrained. So in the cases in question there seems to be no need to distinguish between rights possessed by the members, considered abstractly as a body, and the rights possessed by them as concrete individuals. To ignore the fiction of separate entity, therefore, and regard the suit as one brought in the corporate name by the members collectively, seems not to "defeat the end" — of convenience — "for which the fiction was invented." On the contrary, a strong reason of convenience for so regarding the suit exists in the consequent avoidance of a multiplicity of separate suits. This has always been one of the objects which Equity has sought to attain; and to attain it by disregarding a legal fiction is in harmony with Equity's habit of neglecting the form and considering the substance.

Legislative Control of Municipal Contracts. — State legislation declaring what, in the absence of express contract, shall constitute a day's work is generally held constitutional.[1] Several legislatures, however, have attempted to establish prohibitive limitations upon the length of the working-day and the amount of wages. Such laws seem *prima facie* unconstitutional, since they impose a burden on a particular class, take property without due process of law, and restrict the right freely to contract. Only when the public exigency appears considerable are such acts held to be justifiable and constitutional, being then deemed an exercise of the police power of the state. Thus legislative regulation of the labor of women and children, and of employments where exhausting conditions of labor endanger the public, is generally upheld.[2] As regards general conditions of labor, however, the courts have been quick to hold interference unconstitutional.[3] The New York legislature, for example, passed a statute prohibiting any person or corporation, contracting with the state or a municipal corporation, from requiring more than eight hours' work for a day's labor.[4] Indiana also enacted that unskilled labor employed on any public work of the state, counties, cities, and towns shall receive not less than twenty cents an hour.[5] Recent decisions in both states have held that these statutes lie outside the police power and are therefore unconstitutional. *People* v. *Orange, etc., Co.*, 67 N. E. Rep. 129 (N. Y.); *Street* v. *Varney, etc., Co.*, 66 N. E. Rep. 895 (Ind.).

By the use of narrower terms in these statutes, it is conceived that these purposes might have been substantially attained, and upheld on grounds distinct from the police power. When the state regulates the labor contracts of state, county, and municipal governments, it exercises only the right of a contracting party to determine the terms of his bargain. Thus the legislature may obviously prescribe the terms of contracts made by its officers. As regards counties and municipalities, also, in concerns where these governments are mere agents of the state, the legislature may fix the terms of the contract. Highways, bridges, docks, wharves, and railway subways are examples of such contracts.[6] Local concerns, however, such as

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[1] Tiedeman, State and Federal Control of Persons and Property § 102.
[2] Com. *v.* Hamilton Mfg. Co., 120 Mass. 383; People *v.* Phyfe, 136 N. Y. 554.
[3] *In re* Eight Hour Law, 21 Col. 29.
[4] Pen. Code § 384 h, subd. 1.
[5] Acts 1901, c. 122.
[6] People *v.* Detroit, 28 Mich. 228; People *v.* Flagg, 46 N. Y. 401.

county and municipal buildings and the adornment of streets and parks, cannot thus be controlled by the state.[7] The weakness, therefore, of the New York and the Indiana statutes is the breadth of language which includes both sorts of municipal works, local as well as public. A second weakness is that they apply to contracts let before the statute was enacted. In these two particulars, the statutes *prima facie* restrict freedom of contract and impair contract rights; and the courts seem right in holding this interference unjustified by public exigency and therefore unconstitutional.[8] There appears to be no reason why such restrictive provisions should not be constitutional if only they are sufficiently limited by the legislature in the enacting statute.

THE DOCTRINE OF RESPONDEAT SUPERIOR. — It is a fundamental principle of agency that the master is responsible for injuries to third persons caused by the negligence of his servants in the course of their employment. Although this doctrine of *respondeat superior* is well settled, yet it is often difficult to determine when the relation of master and servant exists. It is undoubtedly good law that where the servant of one party is placed merely under the general supervision of another, the relation of master and servant is not established between them.[1] Nor is the original employer absolved from liability.[2] If, on the other hand, control as to details is delegated and exercised, the liability is transferred from the employer to the person exercising such control.[3]

A recent New York case suggests that there may be a third class of cases between the two above. The trains of the Lehigh Company were operating over the tracks of the Erie Railroad Company under a contract which provided that such trains should be subject to the exclusive control of the Erie Company. The plaintiff, while crossing an Erie track on the highway, was injured through the negligent management of a Lehigh train. The court held the Erie Company liable, basing its decision on the doctrine of *respondeat superior*. *Decker* v. *Erie R. R. Co.*, 85 N. Y. App. Div. 13. The decisions in a few similar cases would seem to support this conclusion.[4] It should be observed that while the Lehigh trains were, by the contract, subject to the exclusive control of the Erie Company even as to details, nothing appears to show that the latter was actually exercising that control when the injury occurred. It is submitted that in order to fasten the liability upon the Erie Company, it should not only have had the right to control the employees of the Lehigh Company, but should also have been in the actual exercise of that right. In no true sense could the crew of the Lehigh train be said to be the servants of the Erie Company. They were employed by the Lehigh Company, were acting for its benefit and in accordance with its orders. Only by the intervention of orders from the Erie Company, would they become the servants of the latter for the purposes of liability. If this argument be sound, it would follow that the decision is an unfortunate one.

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[7] Dillon, Munic. Corp. § 71.
[8] See also Cleveland *v.* Clements Bros. Constr. Co., 65 N. E. Rep. 885 (Ohio).

[1] Langher *v.* Pointer, 5 B. & C. 547.
[2] Coggin *v.* Central R. R. Co., 62 Ga. 685.
[3] Brown *v.* Smith, 86 Ga. 274.
[4] Atwood *v.* Chicago, R. I. & P. R. Co., 72 Fed. Rep. 447.

It is thought unfortunate also for another reason, — one which is an objection to all cases in which the doctrine of *respondeat superior* is applied to a person in control of a servant employed by another. The employee's only direct duty of obedience is by virtue of his contract with his employer, and it would seem, therefore, that he owes that duty to his employer alone. It is difficult, consequently, to understand how he can be in fact the servant of a third person to whom he owes no direct duty;[5] yet, if the relation of master and servant be not established, it is admittedly impossible to apply the doctrine of *respondeat superior*. This difficulty seems, however, to have been overlooked in the decided cases.

Equitable Assignment of Choses in Action. — Few legal expressions seem more loosely defined and inexactly employed than the phrase "equitable assignment" in cases where parties are dealing with choses in action. This inaccurate use of the term is probably due to the fact that the word "equitable" indicates the nature of a remedy rather than the form of an assignment. Whenever a court of equity protects an assignee the assignment is equitable. It has been easy, then, to lay stress on the remedy rather than the transaction which gave rise to it, and the nature of that transaction is often quite overlooked by the courts. From the decisions it is not always easy to see just what sort of transaction equity will enforce as an assignment.

Some of the cases are plain. For example, where the consignor of goods directed the consignee to pay a portion of the proceeds of the sale to a creditor of the consignor, this creditor prevailed against the consignor's trustee in bankruptcy, though the last named by telegram countermanded the direction before it was received by the consignee. *Alexander* v. *Steinhardt, Walker & Co.*, [1903] 2 K. B. 208. This was a clear case of equitable assignment, if the court was justified in finding from the course of business that the creditor accepted in satisfaction of his debt a part of the consignor's claim. In that case the intention of the parties to assign that claim was clear, and it is the intention of the parties that equity in all these cases rightly attempts to enforce. Since the assignment here was of a part of the claim only, the creditor acquired no rights at all at law, not even a power of attorney. His only remedy was in equity.[1]

Not all the cases, however, are so simple. Where a contractor maintained a special fund for the payment of wages, and a bank other than the depositary advanced on checks drawn upon that fund money to be used in the payment of wages, the bank prevailed against the contractor's trustee in bankruptcy, though the checks had not been presented for payment. *Fortier* v. *Delgado & Co.*, 122 Fed. Rep. 604 (C. C. A., Fifth Circ.). The court said the *checks* were an equitable assignment. But checks on a general fund are never treated as assignments.[2] Yet in both cases the character of the checks, as checks, is the same. They are mere revocable orders on which the payee acquires before acceptance no rights against the drawee either at law or equity. But in this case, as in every other, the real question was to find the intent of the parties, for it is this which equity enforces. And the intention to assign could be found here,

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[5] See 12 Am. L. Rev. 69.

[1] Getchell *v.* Maney, 69 Me. 442.

[2] Hall *v.* Flanders, 83 Me. 242.

for the drawing and accepting a check on a specified fund, known by the payee to be in existence, would indicate an assignment of part of the drawer's claim.[3] Where one draws generally, on the other hand, the facts would hardly indicate such an assignment of claim; the payee relies, not on the existence of a fund, but on the credit of the drawer. In both cases the payee gets a revocable order. But in the first case the order is good evidence of an equitable assignment, and in the second case it is not such evidence. The court must find the intention of the parties to assign a claim from the circumstances of the transaction, as well where it is the drawing of a check as where it is the simple, unmistakable assignment of a debt. It is in the intention of the parties that the assignment lies.

In all these cases, of course, the equitable remedy will be allowed only where the remedy at law fails. Thus where a check is drawn on a special fund, the drawer, if solvent, could stop payment without interference by a court of equity, for the payee would still have his remedy on the instrument. But when the drawer is bankrupt that remedy is inadequate, and equity will therefore protect the payee.

Duty of Care between Confederates in Illegality. — If a plaintiff must show an illegal transaction in proving his case, the courts generally will not allow him to recover. This broad principle, however, has several recognized limitations. It applies only to negligent injuries, for the plaintiff's illegal act is no bar to his recovery for intentional harm.[1] Negligent injuries, however, may be of two kinds. They may result from the negligence either of a stranger to the illegal transaction, or of a confederate in illegality. In the former case, generally speaking, if the illegal act is a mere condition, not a cause of the injury, the plaintiff is not barred.[2] In the latter case, the weight of authority seems to hold that the courts will not enforce any duty of care between confederates in illegality, independently of any question of causation.[3] This rule was strictly applied in a recent North Carolina case. An editor, travelling on a pass, was injured by the railroad's negligence. A statute made it criminal to issue such a pass, and imposed a fine upon all companies which did so. The court held that the editor, being a party to an illegal transaction, could not recover. *McNeill* v. *Durham & C. R. Co.*, 44 S. E. Rep. 34. This result of the rule seems unjust for two reasons. First, even admitting the rule to be sound, the parties in the present case are not equally culpable, and the decision protects the chief offender. On this point some courts hold that where the illegality of the transaction is statutory, and the penalty imposed only on one party, the other is not *in pari delicto*, and is not barred.[4] That is the case here, and such a limitation seems more just than the general rule followed by the court. Second, the rule itself is open to objection. It seems unfair that a defendant should always escape liability

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[3] See Ketchum *v.* St. Louis, 101 U. S. 306.

[1] Welch *v.* Wesson, 6 Gray (Mass.) 505.

[2] Sutton *v.* Wauwatosa, 29 Wis. 21.

[3] Hegarty *v.* Shine, L. R. 4 Irish 288; Gilmore *v.* Fuller, 198 Ill. 130. But *contra*, Gross *v.* Miller, 93 Ia. 72.

[4] Tracy *v.* Talmadge, 14 N. Y. 162, and cases cited. Atlas Bank *v.* Nahant Bank, 44 Mass. 581, at p. 587.

when he is a confederate in illegality, although when he is innocent he escapes only when the plaintiff's illegality is a cause of the injury. The law-breaking defendant should not be treated more leniently than the law-abiding one, yet that is the effect of this rule. It would be more just to apply the test of causation in all cases, whether the defendant be a stranger or a confederate.

The rule on which the case in question was decided may also be attacked on a broader ground. The basis of all these rules is supposed to be public policy. The courts say they will not grant redress to a man who must come before them as an admitted wrongdoer. It seems just that a wrongdoer whose wrongful act is a cause of the injury, should be barred. When, however, the law goes farther, and denies a plaintiff redress simply because he and the man who injured him were engaged at the time in a violation of law, it seems to be using the civil law for punitive purposes. Nor is there any sufficient reason for creating an exception to the general rule that all citizens shall have access to the courts. On the whole, therefore, the rule is deemed to have no real basis in public policy. The attitude of the Iowa court,[5] which refuses to recognize any such rule, seems more commendable.

Right to Sue as a Constitutional Privilege. — The Supreme Court of the United States has several times said, by way of *dictum*, that Art. 4, § 2 of the Constitution, providing that "a citizen of one state shall be entitled to the privileges and immunities of citizens in other states," protects the right of a citizen of one state to maintain actions of every kind in the courts of another.[1] The Supreme Court has never actually decided the point; but its *dicta* have been made the basis of two decisions[2] that a court may never refuse to retain jurisdiction on account of a plaintiff's non-residence. On the other hand these *dicta* are tacitly rejected by a recent New York case. The plaintiff was injured in Connecticut by the defendant's automobile. Both parties residing in Connecticut, the New York court refused to retain jurisdiction. *Collard* v. *Beach*, 81 N. Y. App. Div. 582.

The question which has occasioned this conflict is also involved in a consideration of the constitutionality of the statutory provisions in New York and other code states restricting actions by non-residents against foreign corporations. The courts of New York[3] and South Carolina[4] have overruled objections to the constitutionality of such provisions on the short ground that they discriminate, not between citizens and aliens, but between residents and non-residents. This argument, if sound, would also support the principal case. Its soundness depends upon whether in the statutory provisions in question residence is used in the sense merely of continuous bodily presence. The word may rightly be interpreted in this popular, rather than in its legal, sense in statutes whose object is to provide a substi-

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[5] Gross *v.* Miller, *supra.*

[1] See Ward *v.* Maryland, 12 Wall. (U. S.) 418, 430; Miller, J., in Slaughter-house Cases, 16 Wall. (U. S.) 36, 76, quoting Washington, J., in Corfield *v.* Coryell, 4 Wash. (U. S., C. C.) 371, 380.

[2] Cofrode *v.* Gartner, 79 Mich. 332; Eingartner *v.* Ill. Steel Co., 94 Wis. 70.

[3] Robinson *v.* Oceanic Steam Nav. Co., 112 N. Y. 315.

[4] Central R. R. Co. *v.* Georgia, etc., Co., 32 S. C. 319.

tute for process, such as the requirement that non-residents give security for costs.[5] But the New York rule,[6] supported by the great weight of authority,[7] is that where residence is prescribed "as a qualification for the enjoyment of a privilege" it must be interpreted to mean domicile. And domicile is the only test of citizenship in one state of the Union rather than another. "A citizen of the United States residing in any state of the Union," says Chief Justice Marshall,[8] "is a citizen of that state," and the Fourteenth Amendment bears him out. The distinction of the New York and South Carolina courts between "resident" and "citizen" would, therefore, seem to be merely verbal, and insufficient to support their decisions.

These decisions and the principal case may, however, be supported on a broader ground. In the case of McCready *v.* Virginia,[9] the constitutionality of a statute forbidding non-residents to take oysters from Virginia waters was in question. In sustaining the statute, the Supreme Court of the United States declared that, to come within the meaning of Art. 4, § 2, a privilege must be "in its nature fundamental, belonging of right to the citizens of all free governments"; and that the right to fish in Virginia waters is not such a privilege, belonging, as it does, to a citizen of Virginia by virtue, not of general citizenship, but of citizenship confined to a particular locality. The same is true of many other "privileges and immunities" to which the constitution has never been thought to apply, such as the right to vote in a particular state, or to use its public schools. So of the right to sue non-residents in state courts. The privilege to seek redress in the courts is fundamental; but the right to seek redress in one particular set of courts is an incident of local, not of general, citizenship, and seems, therefore, not to differ from the right in question in McCready *v.* Virginia. And if the question were presented to the Supreme Court, its decision, not its *dicta*, would probably prevail.

RECENT CASES.

ADVERSE POSSESSION — GAINING OF TITLE BY THE GOVERNMENT. — The United States bought land at an administrator's sale and continued in possession, openly using the land for a cemetery, during the period prescribed by the statute of limitations. The sale was later found to have been void, and an action to try title was brought against the defendant, who had derived his title from the United States. *Held*, that the defendant has a valid title, since the United States had acquired title by adverse possession. *City of El Paso* v. *Ft. Dearborn Nat. Bank*, 74 S. W. Rep. 21 (Tex., Sup. Ct.).

Adverse possession carries with it a right in the land, good against all the world except the true owner. Unless the true owner asserts his right within the period of the statute of limitations, he is debarred, and the occupant's title becomes complete. Since no action lies against the sovereign, it has been laid down that the statute will not operate in favor of the government. *San Francisco Sav. Union* v. *Irwin*, 28 Fed. Rep. 708. As a rule of law, however, this affords an unsatisfactory test, for in many cases the owner has a means of recovering his land. It is inapplicable where the government is by statute liable to suit. *Baxter* v. *State*, 10 Wis. 454. Often, as in

[5] See Haggart *v.* Morgan, 5 N. Y. 422.
[6] People *v.* Platt, 117 N. Y. 159.
[7] Jacob, Dom. § 75, and cases cited.
[8] Gassies *v.* Ballon, 6 Pet. (U. S.) 761.
[9] 94 U. S. 391.

the principal case, action may be maintained against the agents of the government. *United States* v. *Lee*, 106 U. S. 196. The better view seems to be that the government may gain title wherever legal proceedings could have been instituted within the prescribed time either against the government or its agents. *Stanley* v. *Schwalby*, 147 U. S. 508. The principal case, therefore, may be supported both on principle and on authority.

AGENCY — SCOPE OF AGENT'S AUTHORITY — INCIDENTAL POWER. — An agent having written authority from his principals to execute policies in their name and on their behalf, in order to aid an insolvent company in which he was personally interested, wrongfully issued a policy to the plaintiff guaranteeing the payment of certain sums due from the company to the plaintiff. *Held*, that the plaintiff cannot recover upon the policy. *Hambro* v. *Burnand*, [1903] 2 K. B. 399.

It is held in England that a principal is not liable for the misrepresentations of his agent made in the course of his principal's business to further the agent's own private ends. *British Mutual Banking Co.* v. *Charnwood Forest R. Co.*, 18 Q. B. D. 714. As this was a decision of the Court of Appeal, it is not surprising that the divisional court in the principal case should have applied the same rule to contracts. It is submitted, however, that the decisions are, on principle, objectionable. They introduce into the law of agency a false test of liability, namely, benefit or harm to the principal. If an act is within an agent's power, either express or incidental, it surely ought to make no difference, as between the principal and the third party, whether it was for the benefit of the principal or for the sole benefit of the agent. It is believed that the agent in the principal case acted within his incidental power and that the policy should have been held binding upon the principal. *Cf. North River Bank* v. *Aymar*, 3 Hill 262.

BANKRUPTCY — INVOLUNTARY PROCEEDINGS BROUGHT BY ATTACHING CREDITOR. — Three creditors, who had an attachment of less than four months' standing on a debtor's property, petitioned that he be adjudged a bankrupt. *Held*, that the petition is valid, though the attachment must be released before an adjudication. *Re Hornstein*, 122 Fed. Rep. 266 (Dist. Ct., N. D., N. Y.).

The Bankruptcy Act of 1898, § 59 b, provides that three or more persons who have provable claims against any person may file a petition to have him adjudged a bankrupt. In various other sections of the act a distinction is made between proof and allowance of claims. Thus a creditor by § 57 a may prove for any just debt owed him, but by § 57 g his claim will not be allowed until he has surrendered any preference he may have. An attachment claim such as that of the creditors in the principal case is classed as a preference. *Re Schenkein*, 113 Fed. Rep. 421. Their claim then is not allowable. The court, however, carrying out the distinction, says it is provable, and by a strict interpretation of § 59 b, holds that the creditors may file their petition. Heretofore the words "provable claim" have usually been given a different meaning when used in this connection. Before the Act of 1898 they were interpreted as denoting a claim that would be allowed. *Ecker* v. *McAllister*, 45 Md. 290. It seems probable that that is what they mean in this section, and such is the result reached by previous cases. *Re Burlington Malting Co.*, 109 Fed. Rep. 777.

BANKRUPTCY — PRIORITY OF CLAIMS — EXPENSES OF ASSIGNEE UNDER PRIOR ASSIGNMENT. — A general assignment for the benefit of creditors was made void by a bankruptcy petition filed within four months. Legal services had been rendered the assignee. *Held*, that so far as such services have benefited the estate, reasonable claims for compensation should be allowed and are entitled to priority over claims of creditors. *Randolph & Randolph* v. *Scruggs*, 23 Sup. Ct. Rep. 710.

The court in determining the validity of the claims here involved decides a much disputed question. The controlling principles are the same as those governing the assignee's own right to compensation, for which see 15 HARV. L. REV. 578. There is also a conflict as to whether the claims here allowed should rank ahead of ordinary debts. It has been held that such obligations, though incurred by the assignee, are debts of the bankrupt, and are not entitled to priority under any provision of the act. *In re Mays*, 114 Fed. Rep. 600. This decision overlooks, however, the equitable basis on which these claims rest. The assignee himself would have a right of reimbursement from the trust funds to the extent of the sums profitably expended in preserving them. *Clark* v. *Sawyer*, 151 Mass. 64. The claimants are allowed to enforce this right of the assignee. *Central R. R. & B'k'g Co.* v. *Pettus*, 113 U. S. 116. The trustee in bankruptcy consequently received the funds subject to an equitable lien in their favor, and the principal case rightly takes care of this equitable claim before dividing the fund among the creditors.

BANKRUPTCY — PROCEDURE — APPEAL TO SUPREME COURT. — A decree of a district court in bankruptcy proceedings was taken to the Circuit Court of Appeals by a petition for revision. From the decision of that court an appeal to the Supreme Court is claimed, although no question is involved that would be appealable from the highest court of a state. *Held*, that the right of appeal does not exist. *Hutchinson* v. *Otis, Wilcox & Co.*, 123 Fed. Rep. 14 (C. C. A., First Circ.).

The claim was that a right of appeal existed under the Evarts Act, which regulates appeals in general from the Circuit Court of Appeals. U. S. Comp. St. 1901, p. 547. This contention finds support in one case where an appeal was allowed without question under similar circumstances. *Pirie* v. *Chicago Co.*, 182 U. S. 438. The principal case, however, which appears to be the first in which the question was expressly considered since the present bankruptcy act, seems to interpret the statutes correctly. Sec. 25 of the Bankruptcy Act appears to contain an exclusive provision as to such appeals, and requires some question appealable from the supreme court of a state. Moreover the Evarts Act apparently refers only to suits, and bankruptcy proceedings are only parts of a single suit composed of all such proceedings. *Wiswall* v. *Campbell*, 93 U. S. 347. Such appeals were refused under the previous act. *Conro* v. *Crane*, 94 U. S. 441. The general opinion has been in accord with the decision in the principal case that the present act makes no change. See note, 43 C. C. A. 9.

CHECKS — DRAWING ON SPECIAL FUND — EQUITABLE ASSIGNMENT. — A contractor maintained a special fund for the payment of wages, and a bank, other than the depositary, advanced on checks drawn upon that fund money to be used in the payment of wages. Before the checks were paid the drawer became bankrupt. *Held*, that the bank prevails, as against the trustee in bankruptcy, for that portion of the fund covered by the checks. *Fortier* v. *Delgado & Co.*, 122 Fed. Rep. 604 (C. C. A., Fifth Circ.). See NOTES, p. 52.

CHOSES IN ACTION — ASSIGNMENT. — A consignor of goods for sale directed the consignee by mail to pay a portion of the proceeds to a creditor of the consignor. Before the arrival of the letter the consignor became bankrupt and his trustee by telegram countermanded the direction. *Held*, that the creditor prevails against the trustee as to the proceeds of the sale in question. *Alexander* v. *Steinhardt, Walker & Co.*, [1903] 2 K. B. 208. See NOTES, p. 52.

CONSTITUTIONAL LAW — EXEMPTION OF FEDERAL AGENCIES FROM STATE CONTROL. — A strip of land in the state of Minnesota was granted by Congress to the plaintiff railroad for the construction of its line. By the same act the railroad was incorporated and made a post route and military road subject to government use. A portion of the strip was held by the defendants adversely for the period required by the Minnesota statute of limitations. *Held*, that the plaintiff can recover the land in ejectment. *Northern Pacific R. Co.* v. *Townsend*, 23 Sup. Ct. Rep. 671.

It is recognized law that the instrumentalities created by the general government in the exercise of its constitutional powers may not be impaired nor their efficiency lessened by state taxation. *McCulloch* v. *Maryland*, 4 Wheat. (U. S.) 316. Thus United States securities may not be taxed, *Weston* v. *Charleston*, 2 Pet. (U. S.) 449; nor patent rights, *In re Sheffield*, 64 Fed. Rep. 833; nor the franchise of a railroad chartered by the government, *California* v. *Pac. R. R. Co.*, 127 U. S. 1. The power of the state to legislate in other directions is similarly limited. Thus a Soldiers' Home maintained by the government is not subject to state food laws. *In re Thomas*, 82 Fed. Rep. 304. The principal case is a striking application of this principle. The court argues that to allow any portion of the right of way to be parted with by the railroad voluntarily or involuntarily would nullify the purpose of the Act of Congress, and therefore state laws, even so fundamental as those governing the acquisition of real property, must yield. It should be noted that the case is no authority on the general question whether title by adverse user can be gained to land in the right of way of a railroad not operating under a federal charter. For a discussion of that question see 15 HARV. L. REV. 146.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — RESTRICTIONS UPON LABOR CONTRACTS. — The New York legislature passed a statute prohibiting any person or corporation contracting with the state or a municipal corporation from requiring more than eight hours for a day's work. *Held*, that the statute is invalid, since it is an unreasonable exercise of the police power and takes property without due process of law. *People* v. *Orange, etc., Co.*, 175 N. Y. 84.

The Indiana legislature enacted that unskilled labor employed on any public work of the state, counties, cities, and towns shall receive not less than twenty cents an hour.

Held, that the statute is unconstitutional, since it infringes upon the right of municipalities to contract, and takes property without due process of law. *Street* v. *Varney, etc., Co.*, 66 N. E. Rep. 895 (Ind., Sup. Ct.). See NOTES, p. 50.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — RIGHT TO SUE IN STATE COURTS. — The plaintiff was injured in Connecticut by the defendant's automobile, and brought suit in New York. Both parties were residents of Connecticut. *Held*, that the court may refuse to take jurisdiction. *Collard* v. *Beach*, 81 N. Y. App. Div. 582. See NOTES, p. 54.

CONTRACTS — IMPLIED PROMISE NOT TO PREVENT PERFORMANCE — INSURANCE CONTRACT. — The plaintiff was insured for $5000 by the defendant corporation. The defendant passed a by-law limiting the amount payable upon all existing policies to $2000 and refused to accept premiums upon a larger basis. *Held*, that since the contract was to pay at the death of the plaintiff, there was no present breach. *Porter* v. *American Legion of Honor*, 183 Mass. 326. See NOTES, p. 46.

CONTRIBUTORY NEGLIGENCE — LAST CHANCE RULE. — The plaintiff, while negligently crossing a street-car track, was struck by the defendant's electric car. The evidence tended to show that the car was running at an illegal rate of speed, and that, had the speed been lawful, the motorman might have avoided the accident. *Held*, that, assuming the evidence to be true, the plaintiff's contributory negligence is no defense. *Moore* v. *St. Louis Transit Co.*, 75 S. W. Rep. 699 (Mo. App.).

The doctrine that a plaintiff is barred by contributory negligence is extended even to cases where the defendant himself is acting illegally. It is generally limited, however, by allowing recovery, if, after the plaintiff's negligence, the defendant can prevent the injury, but does not. The principal case extends this limitation to cases in which the defendant ought to be able to avoid the injury, and could do so, but for his own prior negligence. It is based largely on a previous case in the Supreme Court of Missouri, in which, on rehearing, four of the seven judges seem to favor such an extension. See *Sullivan* v. *Missouri Pac. Ry. Co.*, 117 Mo. 214. But it is apparently in conflict with a later decision of the same court. *Watson* v. *Mound City Ry. Co.*, 133 Mo. 246. The case seems but an instance of a growing tendency to bar out consideration of the plaintiff's negligence by an extension of the so-called "last chance rule." *Cf. Roberts* v. *Spokane St. Ry. Co.*, 23 Wash. 325; *Thompson* v. *Salt Lake Rapid Transit Co.*, 16 Utah 281. The tendency is in the right direction, for without it a premium is placed on violating the law, and a company is allowed to plead its own wrongdoing in its defense.

CORPORATIONS — DIRECTOR'S LIABILITY TO DISCLOSE MATERIAL FACTS WHEN PURCHASING STOCK. — A director of a corporation purchased stock without disclosing to the stockholder material facts, known to him as director, which were certain to raise the value of the stock if generally known. *Held*, that the sale will be set aside as fraudulent. *Oliver* v. *Oliver*, 45 S. E. Rep. 232 (Ga.). *Held*, that the sale will not be set aside as fraudulent. *O'Neile* v. *Ternes*, 73 Pac. Rep. 692 (Wash.).

Ordinarily, if the parties to a sale bear no fiduciary relation to one another, the fact that one fails to disclose material facts of which the other is ignorant does not affect the validity of the sale. *Laidlaw* v. *Organ*, 2 Wheat. (U. S.) 178. In the principal cases, however, the defendant is director in a corporation, and as such is a trustee for the corporation and owes it such duties as a trustee owes his *cestui que trust*. *Wardell* v. *R. R. Co.*, 103 U. S. 651. He is not, however, a trustee for the stockholders. Yet if we go behind the legal fiction of the corporate existence, as the courts do in proper cases, we at once see that the stockholder is the real party in interest, and it seems fair to say that the director, though not his trustee, is in a fiduciary relation to him. A fiduciary may not deal for his own benefit with the property concerned without a full disclosure of all the facts. *Van Epps* v. *Van Epps*, 9 Paige (N. Y.) 237. Accordingly it would seem that the court is right in the first principal case in holding that the director purchasing stock must disclose to the stockholder facts tending to increase its value. The second, however, represents the weight of authority. *Board of Commissioners of Tippecanoe Co.* v. *Reynolds*, 44 Ind. 509.

CORPORATIONS — LIABILITY OF, AS AFFECTED BY PRIVATE RIGHT OF MAJORITY STOCKHOLDER. — A corporation contracted to furnish articles of a particular description. The owner of a patent obtained an injunction forbidding the corporation to sell such articles on the ground that their sale would infringe his patent. Later the patentee obtained control of the corporation through a purchase of its stock.

Held, that the restraining injunction is unavailable to the corporation as a defense to an action for a breach of the contract. *McElroy* v. *American Rubber Tire Co.*, 122 Fed. 441 (Circ. Ct., Second Circ.).

The court takes the position that the purchase of a controlling interest by the patentee deprived the corporation of the defense which the injunction would otherwise have afforded it. It is well settled that a purchase of all the stock of a corporation does not render any less distinct the difference between the personalities of the stockholder and of the corporation. *Parker* v. *Bethel Hotel Co.*, 96 Tenn. 252. Nor can there be any doubt that a stockholder may sue a corporation for infringement of his patent rights. See *Pierce* v. *Partridge*, 44 Mass. 44. If these two principles are conceded, it is difficult to justify the decision in the principal case. The corporation is just as distinct in individuality from the owner of the patent as it was before he acquired its stock, and it is as impossible for it to perform its contract, without placing itself in contempt, as it then was. Since the stockholder is under no duty to give the corporation the benefit of his patent, it seems unreasonable to inflict an indirect punishment upon him for failing to do so Furthermore the decision imposes hardship on the minority stockholders, who have had no connection with the transaction.

CORPORATIONS — NATURE OF CORPORATIONS — THEORY OF SEPARATE ENTITY. — A membership corporation sued for an injunction against prospective acts of violence on the part of a labor union, which threatened to injure the businesses of the individual members of the corporation. No injury to corporate property was threatened. *Held*, that the injunction will be granted. *Horseshoers' Protec. Ass'n* v. *Quinlivan*, 83 N. Y. App. Div. 459. See NOTES, p. 49.

DEATH BY WRONGFUL ACT — DEFENSES TO STATUTORY LIABILITY — RECOVERY BY OTHER HEIRS. — A statute granted an action for wrongful death to the "heirs or personal representatives" of the deceased. Another statute provided that an unborn child should be "deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth." While the plaintiff, of whose existence the defendant was ignorant, was as yet unborn, the plaintiff's mother recovered a judgment against the defendant, as heir of her husband, the plaintiff's father. *Held*, that the plaintiff is barred by the previous action. *Daubert* v. *Western Meat Co.*, 73 Pac. Rep. 244 (Cal.).

Although the present case expressly leaves the question open, it has elsewhere been held that even though a statute similar to the above is ordinarily construed as contemplating but one action, yet if the defendant, knowing of other parties in interest, allows an action under it to go to judgment without insisting that all such parties be joined, the statute will not be considered a bar to subsequent actions by such parties as were not guilty of laches. *Galveston, etc., R. Co.* v. *Kutac*, 72 Tex. 643. Granting that position sound, the present case must rest upon the fact that the plaintiff's existence was, entirely without his fault, unknown to the defendant at the time of the original suit. That fact, however, seems a somewhat unsatisfactory ground upon which to bar the plaintiff from recovering for a loss which the defendant's negligence has plainly caused him to suffer. The supreme court of Texas, upon almost identical facts, held that the plaintiff was not barred by the previous recovery; and such a rule would seem preferable to that of the principal case. *Nelson* v. *Galveston, etc., R. Co.*, 78 Tex. 621.

GOOD-WILL — RIGHTS OF PURCHASER TO USE FIRM NAME. — One member of a firm doing business under the name of J. & J. Slater died. In an action by his executrix for an accounting and distribution of the firm property the court decreed a sale of the firm assets and good-will. The surviving partner desired the decree to forbid the continued use of the old firm name by any other possible purchasers than himself. *Held*, that the sale should be without limitation in this regard. *Slater* v. *Slater*, 175 N. Y. 143.

Undoubtedly, the name of an old and established firm attracts customers of itself. Consequently the right of third parties purchasing the good-will to retain the old name would tend to enhance their bids at the sale of the business, and would thus directly benefit the estate of the deceased partner. Nor would the surviving partner seem to have any just cause for complaint. Proper notice of the change of ownership would relieve him from all possible liability. *Cox* v. *Pearce*, 112 N. Y. 637. After a judicial sale of the good-will he could be enjoined by the purchasers from employing the name to his own advantage, even though the purchasers did not themselves continue to use it. *Churton* v. *Douglas*, John. 174; *Hegeman Co.* v. *Hegeman*, 8 Daly (N. Y.) 1. To deny the purchasers the right to the name could, therefore, result only in its annihilation to the direct injury of the sellers, and to the benefit of no one. Conse-

quently the decision appears an entirely desirable one. It also accords with the weight of authority. *Snyder M'f'g Co.* v. *Snyder*, 54 Oh. St. 86. The earlier New York decisions, however, were to the contrary. *Mason* v. *Dawson*, 37 N. Y. Supp. 90.

INFANTS — AVOIDING CONTRACT — RETURN OF CONSIDERATION. — An infant made a contract of purchase from another infant, and paid the consideration. After the seller had spent the money, the purchaser elected to avoid the agreement, and brought action for the money paid in contract and in tort for conversion. *Held*, that infancy is a good defense to the action in contract, and that there is no tortious conversion. *Drude* v. *Curtis*, 67 N. E. Rep. 317 (Mass.).

It is well settled that an infant can avoid his contracts, except for necessaries, even though they are executed upon the other side, without returning the consideration or its equivalent. *Chandler* v. *Simmons*, 97 Mass. 508. If, however, he still retains the consideration in his possession, he may, upon demand and refusal, be held liable for conversion. *Fitts* v. *Hall*, 9 N. H. 446. If, on the other hand, as in the principal case, the infant has spent the consideration, text-books and *dicta* agree that the other party is remediless. See TYLER ON INFANCY § 37; *Fitts* v. *Hall*, *supra*. The present case, however, is the only one met with where the facts have been so peculiar as to bring the point squarely before the court for decision; and although the principles involved are elementary, it forms an interesting addition to that part of the law which deals with the protection of infants in their contractual relations. With regard to the count in conversion, the court takes the apparently sound position that as the plaintiff must have expected and in effect consented that the defendant should deal with the consideration as his own, the latter committed no tort in disposing of it. *Dill* v. *Bowen*, 54 Ind. 204.

INNKEEPERS — EXTENT OF LIABILITY — LOSS OF GUEST'S PROPERTY. — The plaintiff's property was destroyed by fire while he was a guest at the defendant's hotel. *Held*, that the innkeeper is *prima facie* liable, but may discharge himself by showing that the loss was due to the fault of neither himself nor his servants. *Johnson* v. *Chadbourn Finance Co.*, 94 N. W. Rep. 874 (Minn.). See NOTES, p. 47.

LAW AND FACT — PROVINCE OF COURT AND JURY — DETERMINATION OF REASONABLENESS. — The city of Philadelphia imposed a license charge on the poles of a telegraph company engaged in interstate commerce. *Held*, that the reasonableness of such a charge is for the jury. *Atlantic, etc., Co.* v. *Philadelphia*, 23 Sup. Ct. Rep. 817.

A city has the right to impose such a license charge, if the amount corresponds to the reasonable expense for inspection and regulation. *Western Union Tel. Co.* v. *New Hope*, 187 U. S. 419. The principal case raises the point as to how the reasonableness shall be determined. Questions of reasonableness are commonly said to be questions of fact for the jury. In certain kinds of questions this is true, *e.g.*, questions of reasonable care or reasonable time. *Gerdes* v. *Christopher & Simpson Co.*, 124 Mo. 347. Where, however, the question is as to the reasonableness of some legislative act, and on this depends its legality, reasonableness has generally been held a question for the court. So the reasonableness of a municipal ordinance is commonly held to be for the court to decide. *Austin* v. *Murray*, 16 Pick. (Mass.) 121. In the principal case, the court admits this as a general rule, but limits it to cases where the reasonableness of the character of an ordinance is in question, as distinguished from cases where the reasonableness of the amount of the charge fixed by an ordinance is concerned. The distinction taken by the court seems of doubtful value, and is inconsistent with the established rule that the reasonableness of rates fixed by the legislature for public service companies is for the court. *Steenerson* v. *Great Northern R. Co.*, 69 Minn. 353.

LIBEL — PRIVILEGED COMMUNICATION. — The plaintiff sued the board of health of a village for the publication of a libel contained in the preamble to an ordinance of the board. The defense was privilege. *Held*, that the statement in the preamble, not being essential to the accomplishment of the object sought, is not a privileged communication. *Mauk* v. *Brundage*, 67 N. E. Rep. 152 (Ohio).

Statements made during judicial proceedings are absolutely privileged only if pertinent and material to the issue. See *McLaughlin* v. *Cowley*, 127 Mass. 316. The court in the principal case applies the same rule to statements in ordinances passed by a board of health, overlooking the fact that the making of such ordinances is from its nature a legislative, not a judicial proceeding. Considerations of public policy have made all acts of the members of a state legislature in the execution of their office abso-

lutely privileged. See *Coffin* v. *Coffin*, 4 Mass. 1. It seems doubtful if the absolute privilege which public policy accords to legislators should be extended to the members of a board of health. But acts done in discharge of public official duty are at least conditionally privileged, and proof of actual malice is necessary to rebut the privilege. See *Mayo* v. *Sample*, 18 Ia. 306. No malice appears in the principal case, and therefore the publication seems to have been privileged. Thus both the decision of the court and the grounds by which it was reached seem questionable.

LIMITATION OF ACTIONS — SAVING CLAUSE IN STATUTE — REMOVAL OF DISABILITY. — A saving clause in the statute of limitations allowed a *feme covert* to sue for the recovery of real property within three years after the removal of the disability. and a later statute removed all of her disabilities, except for an express reservation forbidding her to make an executory contract to sell land unless her husband joined. *Held*, that she does not lose the benefit of the saving clause. *Higgins* v. *Stokes*, 74 S. W. Rep. 251 (Ky.).

The weight of authority holds that where married woman's acts remove all the disabilities of a *feme covert*, their effect is either to take her out of the saving clause in statutes of limitation of actions, or impliedly to repeal so much of them as excepts married women from their operation. *Percy* v. *Cockrill*, 53 Fed. Rep. 872; *Garland County* v. *Gaines*, 47 Ark. 558. Curiously enough, however, it has generally been decided, on various grounds, that where statutes give her, among other rights, that to sue and be sued, but do not completely remove her disabilities, she will still be permitted to take advantage of the saving clause. *Lindell Real Estate Co.* v. *Lindell*, 142 Mo. 61. The present case, however, is one of the first in which the relatively minor disability which remains is made the basis of the decision. So slight a foundation seems hardly sufficient to support a rule so unnecessarily partial to the interests of married women. It would seem more reasonable that when all of her disabilities with reference to which the saving clause was inserted are removed, a married woman should be treated, for purposes of bringing suit, as if sole. *Brown* v. *Cousens*, 51 Me. 301.

MALICIOUS PROSECUTION — PRELIMINARY INJUNCTION AS EVIDENCE OF PROBABLE CAUSE. — *Held*, that a preliminary injunction, granted upon affidavits and after argument, is not sufficient evidence of probable cause to defeat an action for malicious prosecution. *Burt* v. *Smith*, 84 N. Y. App. Div. 47.

A judgment, properly obtained, is conclusive evidence of probable cause, even though subsequently reversed. *Crescent Live Stock Co.* v. *Butcher's Union*, 120 U. S. 141. So the fact that one, after a full and honest statement of facts, acted *bona fide* on the advice of an attorney makes out probable cause. *Stewart* v. *Sonneborn*, 98 U. S. 187. A preliminary injunction is neither final nor decisive, being simply to prevent irreparable mischief pending subsequent investigation. See *Attorney-Gen'l* v. *Paterson*, 9 N. J. Eq. 624. Evidently, then, the reasons making a judgment conclusive as to probable cause are lacking in the case of preliminary injunctions Nor does it seem that they should be given the weight of legal advice. Such an injunction is not necessarily dependent upon the merits of the cause, as is the opinion of counsel; and it is granted on affidavits, which may be untrustworthy. See *Johnson* v. *Comm'rs of Wilson Co.*, 34 Kan. 670. The attorney, on the other hand, must base his decision on a complete and honest statement of the facts if it is to be a defense. On principle, then, there seems to be no reason to question the soundness of the decision in the principal case.

MASTER AND SERVANT — NATURE OF THE RELATION — DOCTRINE OF RESPONDEAT SUPERIOR. — The plaintiff was injured through the negligent management of a Lehigh train, operating over the defendant's tracks under a contract making such trains subject to the exclusive control of the defendant. *Held*, that the defendant is liable on the doctrine of *respondeat superior*. *Decker* v. *Erie Railroad Co.*, 85 N. Y. App. Div. 13. See NOTES, p. 51.

MUNICIPAL CORPORATIONS — ALIENATION OF PUBLIC PROPERTY. — Certain tax-payers brought a bill for an injunction against the City of Valparaiso to restrain it from selling a right to purchase the property of a water company, which right had been reserved to the city in the ordinance granting the company its franchise. The answer, which was demurred to, alleged that the city, being in need of financial aid, had made a more favorable contract for water with a new company. *Held*, that as the right of purchase has never been exercised for public purposes it has not become a public trust and may be sold. *De Motte* v. *City of Valparaiso*, 67 N. E. Rep. 985 (Ind., Sup. Ct.).

It is well settled that a municipal corporation may, under its general powers, alienate its property, except that dedicated to public purposes, as are public waterworks, and that held in trust for public use. *Lake County Water and Light Co.* v. *Walsh*, 65 N. E. Rep. 530 (Ind.); *City of Fort Wayne* v. *Lake Shore, etc., R. Co.*, 132 Ind. 558. The question in the principal case is, therefore, whether this right to purchase waterworks is so held for the benefit of the inhabitants that it assumes the character of a present public trust; or whether it is to be regarded as a city asset, potentially rather than actually of public benefit. The question is new; either view appears theoretically possible; and the protection of the public interests is the only question: consequently a decision on grounds of expediency seems fitting. As such, the decision of the court commends itself and is not without precedent. In New York, when a city ferry was about to be superseded by a bridge, the court on grounds of public policy called the real property used with the ferry private rather than public and allowed the city to sell. *People of the State of New York* v. *City of Albany*, 4 Hun (N. Y.) 675. See also *United States* v. *Case Library*, 98 Fed. 512.

Offer and Acceptance — Implied Authorization of Acceptance by Mail. — The defendant company, through its agent the plaintiff, submitted to a third party living in another town a proposition of sale. The offeree mailed a letter to the defendant company accepting the offer, but intercepted this letter by telegraph before delivery. The plaintiff sued to recover his commission. *Held*, that the plaintiff is not entitled to a commission, since there is no contract. *Scottish-American Mortg. Co., Ltd.*, v. *Davis*, 74 S. W. Rep. 17 (Tex., Sup. Ct.).

It is well settled that, when an offer has been made by mail, the placing of the acceptance in the postoffice marks the completion of the contract. *Vassar* v. *Camp*, 11 N. Y. 441; *Household Fire, etc., Ins. Co.* v. *Grant*, 4 Ex. Div. 216. The reason for this rule, namely, that acceptance by mail is impliedly authorized from the sending of the offer by letter, would extend to cases in which authorization can be implied from any acts whatsoever of the parties. In England acceptance takes effect upon mailing, wherever the parties, although not impliedly authorizing the use of the mail by their acts, would nevertheless naturally contemplate the post as a possible means of acceptance. *Henthorn* v. *Fraser*, [1892] 2 Ch. 27. The principal case seems squarely opposed to the English doctrine. On principle, since the mail now affords the usual means of business communication, it should be treated as an authorized mode of acceptance wherever there is no provision to the contrary, either expressed or implied. Accordingly the doctrine of *Henthorn* v. *Fraser* seems preferable to that of the principal case.

Par Delictum — One Party only Indictable. — An editor, travelling on a pass, was injured by the negligence of the railroad. A statute made it criminal to issue such a pass, and imposed a fine upon all companies which did so, but did not make indictable the user of the pass. *Held*, that the editor cannot recover, since he was a party to an illegal contract. *McNeill* v. *Durham & C. R. Co.*, 44 S. E. Rep. 34 (N. C.). See Notes, p. 53.

Par Delictum — Recovery of Money paid under Illegal Contract. — The plaintiff entered into an illegal insurance contract with the defendant, acting upon representations made by the defendant's agent that such insurance was valid. The agent made the representation in good faith, being mistaken as to the law governing such policies. *Held*, that, as the plaintiff has a right to depend upon the defendant's agent for a knowledge of insurance law, the parties are not *in pari delicto*, and the plaintiff can recover premiums paid under the illegal contract. *Harse* v. *Pearl Life Assurance Co.*, [1903] 2 K. B. 92.

The familiar rule that no recovery is allowed on quasi-contractual grounds between parties *in pari delicto* is difficult to apply, because of the uncertainty as to the meaning of *par delictum*. It is settled that parties are not *in pari delicto* where the law violated by them was designed to protect the one against the other, or where there existed between them the relation of oppressor and oppressed. See *Browning* v. *Morris*, 2 Cowp. 790. The principal case goes further, and finds the parties not *in pari delicto* where one puts faith in the other's supposedly superior knowledge of the lawfulness of the act. But this is so likely to be the case in any illegal transaction that the proposed exception would practically destroy the rule. Even in jurisdictions where money paid under a mistake of law may be recovered the case could hardly be supported, for surely that rule cannot apply to money paid under a contract made in violation of the law. It would seem, therefore, that the court in the principal case might well have reached an opposite conclusion.

PREFERENCES — BANKRUPTCY ACT — PARTIAL PAYMENTS ON RUNNING ACCOUNT. — Payments had been made on a running account. New sales followed, the net result of which was to increase the bankrupt's estate. *Held*, that such payments are not preferential transfers. *Jaquith* v. *Alden*, 23 Sup. Ct. Rep. 649.

For a discussion of the principles involved see 15 HARV. L. REV. 669.

PURCHASE FOR VALUE WITHOUT NOTICE — EXECUTION CREDITOR PURCHASING AT HIS OWN SALE. — A judgment creditor of a trustee caused the land held in trust for the plaintiff to be sold, and purchased it himself, at the execution sale. *Held*, that the land is subject to the trust. *Beidler* v. *Beidler*, 74 S. W. Rep. 13 (Ark.).

Since the burden of showing notice is on the *cestui*, and no notice was shown, the defendant must be taken to have acted innocently. *Molony* v. *Rourke*, 100 Mass. 190. It is well settled that a third person purchasing innocently at a sheriff's sale takes free of all equities. *Landell's Appeal*, 105 Pa. St. 152. The principal case in refusing to apply the same rule to the judgment creditor is in accordance with the weight of authority. *Wright* v. *Douglass*, 10 Barb. (N. Y.) 97; *Williams* v. *McIlroy*, 34 Ark. 85. The courts proceed upon the ground that a judgment creditor buying without notice at his own sale is not a purchaser for value. This position seems questionable. The creditor may, it is true, pass over no money on his bid, but as a consequence of the transaction he does release his judgment claim. The result is in no way different from that which would have been reached had he paid cash to the sheriff and received it back in satisfaction of the judgment. Following this reasoning, some courts have held that the judgment creditor purchasing in good faith at the execution sale acquires a clear title, a conclusion which seems preferable to that of the principal case. *Pugh* v. *Highley*, 152 Ind. 252; *Gower* v. *Doheney*, 33 Ia. 36.

SEDUCTION — EFFECT OF SUBSEQUENT MARRIAGE. — The defendant was indicted under a statute punishing seduction under promise of marriage. Subsequently to the seduction the defendant had married and deserted the complainant. *Held*, that the marriage is no bar to the prosecution. *In re Lewis*, 73 Pac. Rep. 77 (Kan.).

It seems clear that the crime in the principal case was the seduction. As, in point of law, the state is the party injured by a crime, the woman could not condone the offense. *Barker* v. *Commonwealth*, 90 Va. 820. Nor can any past act be recalled; nor is it ordinarily a defense that the criminal has mitigated the effects of his crime after its commission. Hence, logically, the principal case appears sound. See *State* v. *Bierce*, 27 Conn. 319, 324. Yet the desirability of inducing marriage between the parties and thereby repairing in large measure the injury to the woman's reputation, has usually led the courts to an opposite decision as a matter of public policy. *State* v. *Otis*, 135 Ind. 267. Even as a matter of policy, however, it seems questionable whether the subsequent marriage should be treated as an absolute defense; for the end desired would seem to be more effectively reached by merely refraining from the prosecution in cases where the defendant was willing in good faith to fulfil his marital obligations, still reserving the power to prosecute where, as in the principal case, the defendant has gone through the form of marriage merely to escape responsibility.

SELF-DEFENSE — LOSS OF RIGHT THROUGH PROVOKING ASSAULT BY OPPROBRIOUS LANGUAGE. — The defendant, having by the use of abusive language provoked an attack by the prosecuting witness, sought to justify the use of violence in the ensuing affray, on the ground of self-defense. *Held*, that the defendant cannot justify on that ground. *Shaw* v. *State*, 73 S. W. Rep. 1046 (Tex.).

The justification of self-defense is denied where the defendant, by actual or threatened violence, provokes an assault *Johnson* v. *State*, 69 Ala. 253. The same rule has been applied where the defendant, by use of language, provoked a fight in order to injure his adversary. See *Stewart* v. *State*, 1 Oh. St. 66. In such cases, taking away the right of self-defense seems justifiable. In either case the defendant has intentionally caused a breach of the peace, and is not a person entitled to the favor of the law. Where, however, the defendant has not intended to provoke a fight, there seems no reason for withdrawing from him the ordinary right of self-defense and leaving him at the mercy of the attacking person. For this reason, the decision of the court in the principal case seems perhaps doubtful.

TORTS — INTERFERENCE WITH BUSINESS — CONTRACT RIGHTS. — The executive council of the defendant union, whom the members had asked for advice, ordered a holiday in order indirectly to raise the wages of members, but without ill will towards the plaintiffs. In consequence, the employees of the plaintiff company left work, in violation of their contracts. *Held*, that the union is liable for the resulting damage.

Vaughan Williams, J., dissented. *Glamorgan Coal Company* v. *South Wales Miners' Federation*, 19 T. L. R. 701 (Eng., C. A.).

The doctrine that it is unlawful to induce another to break his contracts, unless justification is shown, appears fairly well established. *Read* v. *Friendly Society of Stone Masons*, 71 L. J. K. B. 994. What constitutes a justification is uncertain, but it seems clear that mere absence of ill will is insufficient if the defendant's motive is subservience of a selfish interest. *Lumley* v. *Gye*, 2 E. & B. 216. In the principal case the union defended upon the ground that it gave disinterested advice acting under a moral duty. In the absence of other facts, this might constitute a justification. See the dissenting opinion of Vaughan Williams, J. But the union not only advised the members to break their contracts, but ordered them to do so. Moral duty might have justified the advice, but it could not well justify an order which the members of the union would not dare to disobey. Nor does it seem possible for the union to say that it was disinterested, since its underlying motive was to regulate production for its own advantage. The principal case forms an important, and, it would seem, a sound addition to the law upon the subject.

VENDOR AND PURCHASER — FORFEITURE. — In a contract for the sale of land time was stipulated to be of the essence, and the vendee in case of default agreed to forfeit payments already made. *Held*, that the vendor may maintain ejectment against the vendee in default without returning former payments. *Williams* v. *Long*, 72 Pac. Rep. 911 (Cal.). See NOTES, p. 48.

WATERS AND WATERCOURSES — APPROPRIATION FOR IRRIGATION — DISREGARD OF STATE LINES. — The plaintiffs appropriated water from a stream rising in Montana and flowing into Wyoming, by constructing a ditch running from a head-gate in Wyoming across the state line into Montana, where land of two of the plaintiffs was situated. Subsequently the defendants began taking water from the stream at points above the plaintiffs' head-gate, to irrigate their land in Wyoming. *Held*, that the defendants will be enjoined from diverting waters of the stream to the injury of the plaintiffs. *Willey* v. *Decker*, 73 Pac. Rep. 210 (Wyo.).

The court recognizes a right to take water from a stream in one state for application to lands in another. No previous decision has been found upon this exact point. In a case involving similar facts the supreme court of Colorado left expressly undecided the question of rights of certain New Mexican irrigators in Colorado streams. *Lamson* v. *Vailes*, 27 Col. 201. A Utah decision, however, contains a *dictum* in accord with the principal case. See *Conant* v. *Deep Creek, etc., Irrigation Co.*, 23 Utah 627. The common-law rule of riparian rights has never been in force in Wyoming. Necessity and custom have created a law peculiar to the arid regions of the West, under which priority of appropriation for beneficial use is the sole test of right. *Moyer* v. *Preston*, 6 Wyo. 308. The decision in the principal case but recognizes this fundamental principle of Western law, for both custom and the needs of the case led early settlers to disregard state lines in their irrigating schemes. It is to be hoped that other states will follow the lead of Wyoming in this simple solution of a vexed problem.

BOOKS AND PERIODICALS.

TRADERS' AND LABORERS' COMPETITION DISTINGUISHED. — In its sudden expansion to meet the complexities of modern conditions, the law of business competition has elaborated on old principles. Competition pursued with fraud, disparagement, or coercion has always been actionable. See 15 HARV. L. REV. 427, 440. A recent writer has collected cases of competition arising out of acts done by combinations of individuals which would clearly not be actionable if done by single individuals; and he has drawn attention to the apparent tendency of the courts to make combination actionable in cases of laborers' competition, and in cases of traders' competition to hold combination lawful. *The Laborer and the Law*, by N. W. Hoyles, 23 Can. L. T. 11 (Aug. 1903). One class of cases collected by the writer holds that laborers are guilty of tort who combine and by boycott induce persons not to enter into contracts with hostile employers or laborers. *Temperton* v. *Russell*, [1893] 1 Q. B. 715; *Quinn* v. *Leathem*, [1901] A. C. 495; *Giblan* v. *National Amalgamated Laborers Union*, 18 T. L. R. 500. Other cases cited by Mr. Hoyles hold that traders may combine and by means of lowered prices drive a rival from the business. These latter cases rely on the principle that competition by lowering prices is legitimate business practice, and that what is allowable to one is allowable to several in combination. *Mogul Steamship Company* v. *McGregor*, 23 Q. B. D. 598. This apparent divergence between the law of laborers' competition and the law of traders' competition has already been noticed by other writers. 12 *Law Quart. Rev.* 5–7, 201. CLERKE & LIND., TORTS, 2nd ed., 23.

It may be better to study this question from another standpoint. Accepting the general doctrine that competition pursued with fraud, disparagement, or coercion is actionable, one may avoid deciding whether combination be added to this list. Instead, disregarding the element of combination, this explanation rests upon the proposition that any act, either by an individual or by a combination, depriving an employer of a customer or laborer, or dissuading an employer from employing a workman, is *prima facie* tortious. *Morasse* v. *Brochu*, 151 Mass. 567; *Delz* v. *Winfree*, 80 Tex. 400. This is upon the well-recognized theory of torts that intentional temporal damage is actionable unless justified. See 8 HARV. L. REV. 1, 9. It becomes necessary, then, to determine how far the law considers competition sufficient justification. *Mogul Steamship Company* v. *McGregor* shows a *prima facie* tort justified by trade competition; while *Temperton* v. *Russell* shows a *prima facie* tort unjustified by the self-aggrandizement of combined labor. For this distinction a sufficient reason is suggested in the cases. In the competition of prices among traders, the pressure is direct between the competing parties: customers and third persons suffer no pressure from the lowering of prices. The allurement of lowered prices is a means of competition emphatically favored by the law. *Two Masters at Gloucester*, Y. B. 11 Hen. IV, folio 47, placit. 21. The pressure exerted in laborers' competition, however, bears first upon third persons and only indirectly upon the rival laborers. Customers who are dissuaded from dealing with hostile employers, and employers who are dissuaded from employing the competing laborer — as in a boycott — bear the brunt of competition, instead of the competing laborers themselves. In the view of Mr. Justice Holmes, however, competition by either combined laborers or traders is sufficient justification, so long as it is free from fraud, disparagement, and coercion. *Vegelahn* v. *Guntner*, 167 Mass. 92, 104 (dissenting opinion). But the rule which distinguishes between direct and indirect competition both harmonizes the cases and also agrees with the current economic notions and the prevailing

sense of the business community. *Reinecke Coal Mining Company* v. *Wood*, 112 Fed. Rep. 477; *Quinn* v. *Leathem*, [1901] A. C. 495, 539. Traders' and laborers' competition are both *prima facie* tortious; but since self-advancement is essential in business, that competition which damages the least possible number — namely, the competitors' immediate rivals — may well be held sufficient justification; while competition affecting others than the competitors' immediate rivals is insufficient.

Rights of Electric Interurban Railways to use Public Highways. — The law is settled that where an abutter upon a highway retains the fee of the soil over which the highway runs, the public possesses merely an easement. In view of the rapid growth of interurban electric railways the extent of the right in the public to use the highways without compensation to the abutters becomes at once interesting and important. Very similar questions arose when gas and water pipes, telephone poles, and car tracks were first placed in the streets. All were departures from the previous uses of the public easement. A recent and instructive article has suggested that one general rule should be applied to all these new uses, either in city streets or country roads. *Extent of the Public Easement in Country Highways*, by Henry M. Dowling, 57 Central L. J. 225 (Sept. 18, 1903). The rule suggested is that any new use in order not to be an additional burden must be a local convenience fairly commensurate with the damage inflicted, and must not materially interfere with communication by travel. If this test is not satisfied compensation must be made to abutters.

Some rule must be found to cover the rights of interurban railways. It is decided in most states that steam commercial roads are added burdens. *Adams* v. *Chicago, etc., Co.*, 39 Minn. 286. Street passenger roads are not ordinarily held to be additional servitudes. *West Jersey R. Co.* v. *Camden Co.*, 52 N. J. Eq. 31. No test should be adopted that will shake these decisions on account of the vested interests dependent on them. A test based on motive power alone would not be supported by logic or the decisions. *Newell* v. *Minneapolis, etc., Co.*, 35 Minn. 112; *Rische* v. *Texas Transp. Co.*, 66 S. W. Rep. 324 (Tex.). Some courts have appealed in deciding questions of this character to what they call "the terms of the original grant." This test, however, would appear to be in great part a fiction, since in most cases a telephone pole or gas pipe was just as far from the mind of the grantor as a steam commercial railroad. The test proposed in the article is better in that it is free from legal presumption and accords with decided cases.

Interurban railways occupy a place between commercial roads and street passenger lines. In which class they should fall, will often be difficult to determine. The decision of a given case should depend on the nature of the service which the road under discussion renders. If it is essentially a street passenger road in business and equipment, catering to local traffic, even though the cars run for several miles into the country, it would not appear to be an added burden. *Ehret* v. *Camden, etc., Co.*, 61 N. J. Eq. 171. The general arguments originally made in favor of street railways apply. On the other hand, if the business done is truly interurban, the passengers carried being almost entirely those that formerly rode on steam cars, the arguments used against steam roads would be in point. The fact that a car stops at several places within a city increases the local service rendered but does not alone determine the question, since steam railroads often do the same. The size and speed of interurban cars, and the freight handled make the true interurban railway exceedingly like the ordinary commercial road. The resemblance is especially strong on those lines which run limited cars making but few stops. The street passenger business is a very small part of their traffic. Such a road has properly been held to impose an additional servitude on a country road. *Pa. Co.* v. *Montgomery Co.*, 167 Pa. St. 62; *Schaaf* v. *Cleveland, etc., Co.*, 66 Oh. St. 215. One case has reached the same result as to

city streets. *Lange* v. *La Crosse, etc., Co.*, 95 N. W. Rep. 952 (Wis.). Wisconsin cases on this subject are, however, of doubtful value, since no case in that jurisdiction has decided that ordinary electric roads are not added burdens. On principle the same test should apply to both city streets and country roads. The test proposed by Mr. Dowling appears to be a satisfactory one.

THE PROBATION SYSTEM. — It is said in a recent article that the probation system, existing in several states of this country, is now under official discussion in England. *The "Probation System" in the United States*, Anon., 114 L. T. 407 (Feb. 28, 1903). Under the Massachusetts system, which is described as typical, a convicted criminal is not sentenced, when the chances of his reformation are good, as in a case of a first offense, but is released on condition that for a stated period he lead an orderly life within certain conditions imposed by the judge. If these conditions are not observed, the offender is rearrested and sentenced.

It is interesting to consider the justification for this practice under the different theories of punishment. Probably the oldest idea is that punishment is founded on vengeance. Being supported entirely by emotion, it would seem impossible to ascertain by reason or experiment whether any particular system of punishment follows this theory. But the probation system, which omits the penalty entirely in certain cases, could hardly rest upon any doctrine founded solely on the desire for revenge. The closely related theory of "retribution" reduced to its lowest terms is that the injury to society plus an equal injury to the individual leaves nobody injured. WHAR. CR. L., Chap. I. This doctrine requires some degree of punishment, and would seem to afford no foundation for the system under discussion. A more modern and more satisfactory theory is that society punishes crime to prevent crime. HOLMES COM. L. 43; 64 Am. St. Rep. 378, note. Whether society in seeking to prevent crime is acting from a desire to protect itself or from other reasons, is an ethical question of little practical importance to law-makers. In any case under this theory the object of the punishment is to reduce the chances of a repetition of the criminal act. This gives a practical test to apply in determining the proper penalty, and would seem to completely justify the probation system.

It has been suggested by scientific writers that all crime is but the result of a diseased condition. ROSENBERG AND ARONSTAM'S SOCIOLOGIC STUDIES, Chap. I. The probation system seems to follow this, and seeks to apply a rational restraint upon the criminal. Just as the medical profession of to-day treat many diseases by merely prescribing a hygienic life, so the law-makers under this system, by compelling a period of law-abiding, seek to eradicate the criminal tendency. The system is furthermore in line with other modern changes in inflicting punishments. Statutes are generally prevalent seeking to encourage good behavior in a convicted criminal by granting a deduction from the sentence, and certain jurisdictions have adopted the indeterminate sentence law. ILL. STS. (*Starr & Curtis*) § 646; IND. ACTS, 1897, p. 219.

The theory of probation, that crimes are sometimes best prevented by omitting the punishment, seems sound and, according to the article under discussion, the results attained in Massachusetts are highly satisfactory. Should England adopt it, she will be acting along the lines of modern development, looking to a more carefully graded and more rational system of punishment.

THE DECISION IN THE MERGER CASE. By J. H. Thorndike. Boston: Little, Brown and Company. 1903. pp. 36. 8vo.

This is a review of the decision of the circuit court in the case of the United States *v.* Northern Securities Co. The chief function of the pamphleteer, in the discussion of great problems like this of the extent of the law against monopoly, is to make plain the issues upon which the final decision must depend.

These issues Mr. Thorndike states with great skill, with such astuteness indeed that those who support the decision of the court can no longer do so by generalities. This is true as to the principal point in his thesis. Mr. Thorndike states that a combination may destroy competition and yet not restrain trade (p. 6). Even when that very proposition is taken as the basis for argument, is it the fact that the cases bear him out? It is submitted that of the variety of cases having more or less to do with the point at issue those dealing with the construction of the original trusts bear most closely upon the formation of this securities company. In both instances the separate corporations were left in existence; indeed they entered into no agreement between themselves, and therefore all that bound them together was the fact that there was a central body to which most of the shares had been made over by the shareholders. The defense of these first trusts was based upon the chief argument of Mr. Thorndike, that the different corporations remained in existence (p. 17). But the courts could not be made to believe that they could be independent. After all, that is what our law requires, that there shall be no suppression of competition by any process whatsoever. It is no answer to say that a single company might originally have constructed and owned both railroads (p. 33).

B. W.

Cases on Criminal Law. By Jerome C. Knowlton. Chicago: Callaghan & Co. 1902. pp. xi, 397. 8vo.

This work consists of an outline of Criminal Law containing eighty-eight subtopics, in illustration of each of which one case is given. The book seems to be intended rather to supplement a knowledge of the subject, gained primarily through the text-book system, by presenting illustrations of some of its leading principles, than to enable the student to discover principles through a comparison of different instances of their application.

The value of a case-book depends entirely upon the choice and arrangement of the cases. With one exception the cases collected in this book are decisions of American courts, and the selection is in general good. The outline is in some particulars open to criticism. In the chapter on "Conditions of Criminality," the topics "The person must have acted voluntarily" and "There must be criminal intent" are made co-ordinate, while it is clear that the former should be a subdivision of the latter, since coercion justifies a criminal act only as it negatives criminal intent. And the propriety of grouping "Corporations" with "Principals" and "Accessories" as one of the main divisions of the chapter on "Parties to Crime," may also be questioned. The difficulty in the production of such a book as this can hardly be great, still the author has in general done his work thoroughly and scientifically.

A Manual of Medical Jurisprudence, Insanity, and Toxicology. By Henry C. Chapman. Third edition. Philadelphia, New York, London: W. B. Saunders & Co. 1903. pp. 329. 8vo.

This work is based on a series of lectures delivered by the author to the students of the Jefferson Medical College. It is, therefore, a treatise designed rather for the physician than for the practicing attorney. The latter, it is thought, would have little occasion to use it; for in the conduct of cases requiring a knowledge of medicine the attorney would desire a larger and fuller treatment of the particular branch involved, while the legal information contained in this volume is of too general a character to be of great service. To the coroner, however, and more particularly to the coroner's physician, for whom it is especially designed, the work will serve as an admirable hand-book. It contains much practical advice concerning matters which such a physician should investigate preparatory to serving as an expert witness in any particular case, and concerning the best ways and means of determining the facts

involved. The author is particularly qualified to give this advice because he has himself served as coroner of one of the largest cities in the country for many years. The fact that in the course of twelve years the book has reached its third edition is a testimonial that it has met with approval and a wide field of usefulness.

ANALYTICAL TABLES OF THE LAW OF EVIDENCE. For use with Stephen's Digest of the Law of Evidence. By George M. Dallas and Henry Wolf Biklé. Philadelphia: T. & J. W. Johnson & Co. 1903. pp. ix, 89. 8vo.

Systematic as Stephen's Digest is, its system is not immediately apparent to the reader. This is so, chiefly because the rules are stated in a series of articles not subdivided, and, for all that appears from the printed page, entirely unrelated to one another. To supply this deficiency in form seems to be the purpose of the present volume. Its method is to split the undivided articles of Stephen's Digest into short detached phrases or clauses, or to select the salient sentences of several articles and group them under one head. Qualifications and definitions are put into foot-notes. The reader, instead of having to use his intelligence to find out that he is reading, for instance, the fifth exception to the second rule of exclusion, is told so by means of a direct appeal to his eye, through differentiation in type and the use of connecting brackets. An ordinary page contains five kinds of print. Aside from this typographical merit, the book is merely a systematic summary of the law of evidence.

COMPARATIVE SUMMARY AND INDEX OF LEGISLATION IN 1902. New York State Library Bulletin 79. Albany: University of the State of New York. March, 1903. pp. 415–693. 8vo.

As a contribution to the material for comparative study of state government and laws the State Library of New York now issues three annual bulletins: Digest of Governors' Messages, *Summary and Index of Legislation*, and Review of Legislation. These three kindred annuals compose a year-book of great value to the lawyer or layman interested in the study of comparative legislation.

The present work, the thirteenth of its series, is a carefully arranged collection of new laws from all the states, including votes on constitutional amendments and decisions declaring statutes unconstitutional. The summary is confined strictly to new legislation, and amendments are given only when they add to or materially change old laws. Private, local, or temporary acts, unless of great general interest, are omitted. The production of this book is a continuation of the valuable services rendered by Mr. Melvin Dewey and his assistants in the field of comparative legislation.

ADDRESSES AND PROCEEDINGS AT THE DINNER TO MR. JUSTICE JOHN MARSHALL HARLAN, given by the Bar of the Supreme Court of the United States, at Washington, December 9. 1902. Edited by the Executive Committee. New York: Cameron & Bulkley. 1903. pp. 80. 4to.

LEGAL MASTERPIECES, SPECIMENS OF ARGUMENTATION AND EXPOSITION BY EMINENT LAWYERS. Edited by Van Vechten Veeder. St. Paul: Keefe-Davidson Company. 1903. 2 vols. pp. xxiv, 1–618; 619–1324. 8vo.

LITTLETON'S TENURES, in English. Edited by Eugene Wambaugh, Professor of Law in Harvard University. Washington, D. C.: John Byrne & Co. 1903. pp. vii, 340. 8vo.

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by William Mack and Howard P. Nash. Vol. VII. New York: The American Law Book Company. London: Butterworth & Co. 1903. pp. 1139. 4to.

THE INDEPENDENCE OF THE SOUTH AMERICAN REPUBLICS: A Study in Recognition and Foreign Policy. By Frederic L. Paxson. Philadelphia: Ferris & Leach. 1903. pp. 264. 8vo.

TRANSACTIONS OF THE TENTH ANNUAL MEETING OF THE SOUTH CAROLINA BAR ASSOCIATION, held at Columbia, South Carolina, January 15 and 16, 1903. Columbia, S. C.: The R. L. Bryan Company. 1903. pp. 173. 8vo.

PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING OF THE BAR ASSOCIATION OF THE STATE OF KANSAS, held at Topeka, Kansas, January 27 and 28, 1903. Clay Center, Kansas: The Times. 1903. pp. 159. 8vo.

THE DATA OF JURISPRUDENCE. By William Galbraith Miller. Edinburgh and London: William Green & Sons. 1903. pp. xv, 477. 8vo.

HAND-BOOK OF THE LAW OF PRINCIPAL AND AGENT. By Francis B. Tiffany. St. Paul: West Publishing Co. 1903. pp. xiii, 609. 8vo.

THE ESSENTIALS OF A WRITTEN CONSTITUTION. By Harry Pratt Judson. Chicago: The University of Chicago Press. 1903. pp. 43. 4to.

THE TARIFF PROBLEM. By M. J. Ashley, Professor in University of Birmingham. London: P. S. King & Son. 1903. pp. viii, 210. 16mo.

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NOTES ON CONSIDERATION.

THE true theory of consideration is still so imperfectly apprehended that a noteworthy difference of opinion between masters in the subject[1] remains unexplained. I shall not undertake the rash task of adding to the learning on the subject; but I may perhaps be able to indicate how far they really differ, and to examine with somewhat greater particularity the actual decisions upon the point.

Professor Ames defines consideration as "any act or forbearance or promise by one person given in exchange for the promise of another."[2] He does not, however, assert that every promise made upon such consideration is binding; the law may still refuse to annex an obligation to the promise. This he states to be the case when "public policy" (a somewhat vague term for further elucidation of which we must turn to the cases) forbids the obligation.[3] Professor Williston, too, defines consideration as "something given by the promisee in exchange for the promise."[4] He afterwards adds to this a new requirement for a "sufficient consideration"[5] or a "valid consideration,"[6] the requirement of legal detriment. The

[1] Successive Promises of the same Performance, by Samuel Williston, 8 HARV. L. REV. 27; Two Theories of Consideration, by James Barr Ames, 12 HARV. L. REV. 515, 13 *ibid.* 29.

[2] 12 HARV. L. REV. 576.

[3] *Ibid.*

[4] 8 HARV. L. REV. 33.

[5] *Ibid.* p. 36.

[6] *Ibid.* p. 38.

difference between the two views does not lie in the conception of consideration; one holds that though a promise have a consideration, the consideration may not be sufficient, and therefore the law will impose no liability; while the other asserts that though there is consideration, the promise will, if public policy so requires, not be binding.

These differences of statement have led the two authorities to a different result where the consideration of an agreement is the performance of a previously existing obligation. Doing what one is bound to do is not a good consideration, says Professor Williston;[1] while Professor Ames sees in general no public policy against holding one to his promise made on such consideration.[2]

Perhaps these results do not follow necessarily from the principles stated. The ordinary rule approved by Professor Williston may be too broadly stated; while, on the other hand, it may well be urged that there is in some cases a sound objection to permitting the purchase of a promise by the doing of an act already due upon another obligation. Each, it may be, goes beyond the authorities and beyond the necessity of his argument. Let us examine further two of the questions involved.

1. Performance of a contractual duty as a consideration.

Professor Ames has sufficiently proved that in some cases such performance may be a valid consideration for a contract; yet in most cases the authorities clearly hold that it is not. To lay down, as is usually done, a general rule that such performance is or is not a valid consideration is, therefore, unsound. On what ground can we deny validity to this consideration?

Suppose A has already bound himself, absolutely and without the right to further payment for it, to do an act. B (whether the other party to the former obligation or a third party) now offers A a new promise in consideration of doing the act; and A does it. One thing or the other must be true: either A does the act entirely to fulfil his former obligation, as we have assumed he legally ought to do, or he does it partly or entirely to earn the new promise, as by hypothesis he legally ought not to do. If the former is true, he has not performed the consideration for the new promise. If the latter is true, he is attempting to secure a new right by means of a breach of duty — surely, according to Professor Ames's view,

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[1] 8 HARV. L. REV. 33.

[2] 12 HARV. L. REV. 515 (*passim*).

a thing contrary to public policy.[1] On any theory, therefore, the new promise should not be held binding.[2]

This is admitted to be the result of substantially all the modern authorities, at least in America. The performance of a prior legal duty to the same party cannot be made a consideration to bind an additional promise by the same party.[3] Upon this principle (whatever may have been the ground of the earlier decisions) the cases are now supported which hold that the payment or part payment of a debt is not consideration sufficient to support a promise given to secure such payment,[4] as for instance a promise to extend the time for payment of the balance.[5]

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[1] By this I do not mean that it is unfair to accept the new promise or to hope for its fulfilment. The wrong, if it exists, lies in treating the new promise as a bargain for which consideration has been given and which the other must therefore keep. Public policy forbids the promisee to treat the promise as an agreement on consideration instead of a mere gift.

[2] "The reason why the doing what a man is already bound to do is no consideration is not only because such a consideration is in judgment of law of no value, but because a man can hardly be allowed to say that the prior legal obligation was not his determining motive." BYLES, J., in Shadwell *v.* Shadwell, 30 L. J. N. S. C. P. 145.

[3] Stilk *v.* Myrick, 2 Camp. 317; Harris *v.* Carter, 23 L. J. N. S. Q. B. 296; Peelman *v.* Peelman, 4 Ind. 612; Ritenour *v.* Mathews, 42 Ind. 7; Smith *v.* Boruff, 75 Ind. 412; Eastman *v.* Miller, 113 Ia. 404, 85 N. W. Rep. 635; Proctor *v.* Keith, 12 B. Mon. 252; Eblin *v.* Miller, 78 Ky. 371; Machine Co. *v.* Pringle, 41 Neb. 265, 59 N. W. Rep. 804; Hasbrouck *v.* Winkler, 48 N. J. Law 431, 6 Atl. Rep. 22; Bartlett *v.* Wyman, 14 Johns. 260; Robinson *v.* Jewett, 116 N. Y. 40, 22 N. E. Rep. 224; Carpenter *v.* Taylor, 164 N. Y. 171, 58 N. E. Rep. 53; Far Rockaway Bank *v.* Smith, 63 N. Y. App. Div. 432, 71 N. Y. Supp. 518; Bloodgood *v.* Wuest, 69 N. Y. App. Div. 356, 74 N. Y. Supp. 913; Schneider *v.* Heinsheimer, 26 N. Y. Misc. 11, 55 N. Y. Supp. 630; Chilson *v.* Bank, 9 N. Dak. 96, 81 N. W. Rep. 33; Moyer *v.* Kirby, 2 Pears. 64; Kenigsberger *v.* Wingate, 31 Tex. 42; Jones *v.* Risley, 32 S. W. Rep. 1027 (Tex.); Lewis *v.* McReavy, 7 Wash. 294; Foster *v.* Glenowlan Shale Co., 16 N. S. W. L. R. (Eq.) 59.

[4] Foakes *v.* Beer, 9 App. Cas. 605; Skinner *v.* Garnett G. M. Co., 96 Fed. Rep. 735; Bush *v.* Rawlins, 89 Ga. 117, 14 S. E. Rep. 886; Phœnix Co. *v.* Rink, 110 Ill. 538; Beaver *v.* Fulp, 136 Ind. 595; Abbott *v.* Tucker, 4 All. 72; Potter *v.* Green, 6 Allen 442; Warren *v.* Hodge, 121 Mass. 106; Lathrop *v.* Page, 129 Mass. 19; Weber *v.* Couch, 134 Mass. 26; Bowditch *v.* Chickering, 139 Mass. 283, 30 N. E. Rep. 92; Willis *v.* Grammill, 67 Mo. 730; Tucker *v.* Bartle, 85 Mo. 114; Harrison *v.* Wilcox, 2 Johns. 448; Bendix *v.* Ayers, 21 N. Y. App. Div. 570, 48 N. Y. Supp. 211; Roberts *v.* First Nat. Bk., 8 N. D. 474, 79 N. W. Rep. 993; Brockley *v.* Brockley, 122 Pa. St. 1; Martin *v.* Frantz, 127 Pa. St. 389, 18 Atl. Rep. 20; Rehm *v.* Frank, 16 Pa. Super. 175; Smith *v.* Phillips, 77 Va. 548.

[5] Cowlin *v.* Cook, Noy 83, Latch 151, Poph. 183; Deacon *v.* Gridley, 15 C. B. 294; Liening *v.* Gould, 13 Cal. 598; Holliday *v.* Poole, 77 Ga. 159; Shook *v.* Board of Commissioners, 6 Ind. 461; Hume *v.* Mazelin, 84 Ind. 574; Smith *v.* Bartholemew, 1 Met. 276; Price *v.* Cannon, 3 Mo. 453; Nightingale *v.* Meginnis, 34 N. J. Law 461; Parmelee *v.* Thompson, 45 N. Y. 58; Mutual Life Ins. Co. *v.* Aldrich, 44 N. Y. App. Div. 620, 60 N. Y. Supp. 195; Turnbull *v.* Brock, 31 Oh. St. 649.

It is to be noticed, however, that if the consideration includes not only the legal duty, but also something beyond, it will support the new promise. Thus, a promise to pay a seaman money if he would become a hostage is binding if he does so, since it is not part of a seaman's duty to become a hostage.[1] So if a party would be relieved from his obligation by a court of equity his performance of it might be a good consideration.[2] Upon this principle it is held that the payment of a debt at a certain time or in a certain way not required by law is a sufficient consideration to bind a promise of the creditor. Thus it is sufficient consideration to pay before maturity,[3] or to pay by giving a chattel instead of money,[4] or a negotiable promissory note of a third party,[5] or even of the debtor himself.[6] So giving new security is sufficient consideration.[7]

There is no difference in principle whether the prior duty is owed to the new promisor or to another; the same arguments prove that its performance cannot be sufficient consideration to bind the new promise. It is accordingly held in such cases that the performance of a prior legal duty to a third person cannot be a good consideration.[8]

It has sometimes been urged that two important English cases lay down a different rule. In Shadwell *v.* Shadwell[9] an uncle offered his nephew an allowance upon his marrying a woman whom he had contracted to marry. The object of the offer appears to have been the encouragement of an immediate marriage; the con-

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[1] Yates *v.* Hall, 1 T. R. 73.

[2] Greenliff *v.* Baker, 1 Leon. 238, pl. 317; Hubbard *v.* Farrer, 1 Vin. Abr. 306, pl. 17; Stewart *v.* Keteltas, 36 N. Y. 388.

[3] Flight *v.* Gresh, 8 Hutt. 76, Cro. Car. 8; Royal *v.* Lindsay, 15 Kan. 591.

[4] Foakes *v.* Beer, 9 App. Cas. 605 (*semble*); Day *v.* Gardner, 42 N. J. Eq. 199, 17 Atl. Rep. 365 (*semble*); Cox *v.* Seeley, 28 N. Sc. 210 (aff'd by the Supreme Court of Canada, Cont. Dig. 67). In Yeary *v.* Smith, 45 Tex. 56, 72, it seems to be required, contrary to the general opinion, that the chattel must be worth more than the debt.

[5] Luddington *v.* Bell, 77 N. Y. 138; Allison *v.* Abendroth, 108 N. Y. 138, 15 N. E. Rep. 606.

[6] Rees *v.* Berrington, 2 Ves. jr. 540; Curlewis *v.* Clark, 3 Ex. 375; see Russ *v.* Hobbs, 61 N. H. 93. But see *contra* Arend *v.* Smith, 151 N. Y. 502, 45 N. E. Rep. 872.

[7] Jaffray *v.* Davis, 124 N. Y. 164, 173, 26 N. E. Rep. 351.

[8] Westbie *v.* Cockayne, 1 Vin. Abr. 312, pl. 36; Johnson *v.* Seller, 33 Ala. 265; Harris *v.* Harris, 9 Col. App. 211, 47 Pac. Rep. 841; Schuler *v.* Myton, 48 Kan. 282, 29 Pac. Rep. 163; Holloway *v.* Rudy, 60 S. W. Rep. 650, 22 Ky. L. Rep. 1406; Putnam *v.* Woodbury, 68 Me. 58; Gordon *v.* Gordon, 56 N. H. 170; L'Amoreux *v.* Gould, 7 N. Y. 349 (*semble*); Gerlach *v.* Steinke (Super. Ct. Buffalo), 22 Alb. L. Jour. 134; Hanks *v.* Barron, 95 Tenn. 275, 32 S. W. Rep. 195; Davenport *v.* Congregational Society, 33 Wis. 387.

[9] 30 L. J. N. S. C. P. 145.

sideration was not the mere fulfilment, but the immediate fulfilment, before it was legally required, of the promise made to the woman. This was expressly required in a later similar case.[1] In another case of the sort the consideration was the making of "all pecuniary and necessary arrangements . . . to constitute a legal marriage." On its face this seems to call for a mere fulfilment of legal obligation; but the offer undoubtedly contemplated what was in fact done, that is, the drawing and execution of a marriage settlement, — a matter not required by the contract to marry.[2] The other case, often cited as one of this class, is Scotson *v.* Pegg.[3] In that case the consignee of goods in the hands of a carrier ordered him to deliver them to the defendant, whereupon the defendant "in consideration the [carrier] would deliver" the goods promised to unload the vessel quickly. Being sued on the promise, the defendant claimed there was no consideration, because the carrier was bound to the consignee to deliver to the defendant. On careful analysis the case appears to be one where the defendant's promise was made in consideration of the plaintiff's *promise* to deliver; the second contract, in other words, was bilateral. The declaration, to be sure, describes a unilateral contract, but such a contract seems impossible in this case. As delivery by a carrier and unloading are necessarily simultaneous, if delivery itself were the consideration it could be given only when the defendant fulfilled his promise; neither could be bound to a future act. This defect in the declaration was cured in the plea, which confessed "the said promise of the plaintiffs." Counsel for the defendant argued the case as one of alleged bilateral contract ("the plaintiffs were under a prior legal obligation to deliver the cargo, and therefore the promise to the defendant to do the same thing was void"), and the court proceeded on that supposition, Wilde, B., saying: "I accede to the proposition that if a person contracts with another to do a certain thing he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make *a valid promise* to another to do the same thing." The italics are those of the present writer.

Where there is no obligation to perform the prior contract, as for instance because of the non-performance of a condition by the

[1] Skeete *v.* Silberburg, 11 T. L. R. 491.
[2] Chichester *v.* Cobb, 14 T. L. R. 433.
[3] 6 H. & N. 295.

other party, performance without insisting on the condition may, of course, be a good consideration.[1]

In all these cases the new promisee was bound to perform his old obligation without further compensation. It is quite possible, however, to make a promise or offer in contemplation of another promise or offer. If at the time the prior contract was made the agreement left a party free to get further compensation for his act, there would be no reason why he should not buy a new promise by the performance of the act. So where a bilateral agreement is made to guarantee a future sale by one party to a third party, the former may make a good contract of sale, though the consideration for it is the performance by the seller of his prior obligation, — he is doing what he is already bound to do.[2] If ten men offer A a thousand dollars each if he will build a church, it could hardly affect the liability of the nine to him if the tenth, before making his subscription, secured an agreement from A to build.

Though the prior contract was not made in contemplation of the second agreement, the latter may be binding. If the offer for the second unilateral agreement was made before the bilateral contract and in contemplation of it, the performance of the bilateral contract may properly be made a valid consideration. Thus where a master of a vessel of war offered a man extra compensation if he would serve as cook on his vessel, the cook had a legal right to the extra wages though the consideration for them was a service he had bound himself to render, by signing the shipping articles, before he earned the wages.[3]

These last cases are not exceptions to a general rule. They are uncommon but not exceptional cases where it is not contrary to a man's duty to earn a second promise by the performance of his contract. Where that is the case, since there is a consideration for the second promise and the consideration is not invalid (to use Professor Williston's term) or contrary to public policy (to use Professor Ames's), the second promise is binding. It may perhaps be laid down generally that if the offer for either the bilateral or the unilateral agreement, made while the offeree was bound by neither agreement, contemplated the making of both agreements, then both are binding.

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[1] Brownlee *v.* Lowe, 117 Ind. 420.

[2] See Martin *v.* Wright, 6 Q. B. 917; Lawrie *v.* Scholefield, L. R. 4 C. P. 622; Frost *v.* Weatherbee, 23 S. C. 354.

[3] Clutterbuck *v.* Coffin, 3 M. & G. 842. *Accord.* Corrigan *v.* Detsch, 61 Mo. 290.

2. Promise to perform a contractual duty as a consideration.

That a promise is an act, and therefore if requested as a consideration should be dealt with like any other act, seems clear.[1] But it is necessary to consider with some care what is meant by the request for a promise. The thing desired is certainly not merely the utterance of certain words; it is rather the expression of assent to an agreement.[2] While to promise does not mean to make a contract — a contract is the act of the law — it does mean to come into an agreement, which is a mere act of the parties.[3]

Suppose now A and B are already bound by an agreement, and B offers a new promise to A if A will promise to perform his original agreement; A renews his prior promise. If he has continued constant to his former agreement, this is the mere reciting of words, not expressing assent to an agreement; the parties are where they were before,[4] no act has been done in any fair sense, and B's new promise is without consideration. If on the other hand A has unlawfully withdrawn from his obligation by expressing his refusal to carry it out, he is legally bound to reconsider and carry out his obligation without further consideration, and as in the cases already considered it would be (to use Professor Ames's term) against public policy to allow him to obtain a new contract by means of persisting in wrong; while therefore to renew his assent to the agreement would be a consideration, it would not be sufficient to make the other's promise binding. In accordance with this view, a promise to perform a prior contract is not a good consideration for a new promise by the other party to the contract.[5] So a promise to extend the time for payment of a debt in consideration of the promise to pay it is not binding;[6] nor is such

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[1] 13 HARV. L. REV. 31.

[2] See Evans *v.* Hooper, 1 Q. B. D. 45.

[3] 13 HARV. L. REV. 32.

[4] "Such a promise, which leaves the legal rights of the parties just where they are, creates no cause of action." MAULE, J., in Deacon *v.* Gridley, 15 C. B. 295, 309. See also Lingenfelder *v.* Wainwright Brewing Co., 103 Mo. 578, 15 S. W. Rep. 844; Miner *v.* Overseers of the Poor, 104 Pa. 317; Runnamaker *v.* Cordray, 54 Ill. 303; but see Devine *v.* Murphy, 168 Mass. 250, 46 N. E. Rep. 1066.

[5] Bayley *v.* Homan, 3 B. N. C. 915, 921; Mallalieu *v.* Hodgson, 16 Q. B. 689; Jackson *v.* Corbin, 8 M. & W. 790; Sullivan *v.* Sullivan, 99 Cal. 187, 33 Pac. Rep. 862; Davis *v.* Morgan (Ga.), 43 S. W. Rep. 732; Goldsbrough *v.* Gable, 140 Ill. 269, 29 N. E. Rep. 722; Fensler *v.* Prather, 43 Ind. 119; Roehrs *v.* Timmons, 28 Ind. App. 578, 63 N. E. Rep. 481; Early *v.* Burt, 68 Ia. 716; Wescott *v.* Mitchell, 95 Me. 377, 50 Atl. Rep. 21; Wendover *v.* Baker, 121 Mo. 273, 25 S. W. Rep. 918; Schneider *v.* Heinsheimer, 26 N. Y. Misc. 11, 55 N. Y. Supp. 630.

[6] Abel *v.* Alexander, 45 Ind. 523; Dare *v.* Hall, 70 Ind. 545; Jennings *v.* Chase, 10 Allen 526; Kern *v.* Andrews, 59 Miss. 39; Allen *v.* Plasmeyere (Neb.), 90 N. W. Rep. 1125; Stickler *v.* Giles, 9 Wash. 147, 37 Pac. Rep. 293.

promise to pay a sufficient consideration for any other promise.[1] So an agreement to pay out of specified assets is not sufficient consideration, since the debtor is already bound to pay out of any assets.[2]

But here, as in the case formerly considered, if the promise given as consideration includes anything beyond the existing duty the new contract is binding. Thus where a surety on a tenant's contract to pay rent and repair promised after default to pay rent and repair, this was sufficient consideration to bind the landlord's promise, since the surety was not bound personally to make repairs.[3] And where bail, having the right to surrender his principal, agreed to pay if the creditor would extend the time, the creditor's promise to do so was binding, since the other was not bound to pay if he surrendered his principal.[4]

On the same principle a bilateral agreement, by the creditor to extend the time for payment until a certain day, and by the debtor to pay interest until that time, is binding, since the debtor thereby gives up his right to pay before the time and thus stop the running of interest.[5]

In a very few jurisdictions it appears to be held that where two parties, being bound by an executory bilateral contract, agree to modify it or to remake it with an addition, the promise on one side being unchanged and on the other increased, the new agreement is binding.[6] On the other hand in most jurisdictions it is

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[1] Solary *v.* Stultz, 22 Fla. 263; Titsworth *v.* Hyde, 54 Ill. 386; Jennings *v.* Neville, 180 Ill. 270, 54 N. E. Rep. 202; Harrison *v.* Cassady, 107 Ind. 158; Specialty Glass Co. *v.* Daley, 172 Mass. 460, 52 N. E. Rep. 633; Keffer *v.* Grayson, 76 Va. 517.

[2] Ford *v.* Garner, 15 Ind. 298; Grover *v.* Hoppock, 2 Dutch. 198; but see Lamkin *v.* Palmer, 164 N. Y. 201, 58 N. E. 123. So of an executor's promise to pay out of the assets of the estate. Philpot *v.* Briant, 4 Bing. 717, 721.

[3] Morris *v.* Badger, Palm. 168, 189.

[4] Thomson *v.* Way, 172 Mass. 423, 52 N. E. Rep. 525. This appears to have been overlooked in Holmes *v.* Boyd, 90 Ind. 332.

[5] Rees *v.* Barrington, 2 Ves. jr. 540; Stallings *v.* Johnson, 27 Ga. 564; Reynolds *v.* Barnard, 36 Ill. App. 218; Alley *v.* Hopkins, 98 Ky. 668; Chute *v.* Pattee, 37 Me. 102; Simpson *v.* Evans, 44 Minn. 419, 46 N. W. Rep. 908; Moore *v.* Redding, 69 Miss. 841; Fowler *v.* Brooks, 13 N. H. 240; McComb *v.* Kittridge, 14 Oh. St. 348; Fawcett *v.* Freshwater, 31 Oh. St. 637; Benson *v.* Phipps, 87 Tex. 578. In Wilson *v.* Powers, 130 Mass. 127, the general doctrine was recognized, but the court was unable to find any agreement of the debtor to refrain from paying the debt and to pay interest throughout the new term. *Contra*, Abel *v.* Alexander, 45 Ind. 523; Dare *v.* Hall, 70 Ind. 545; Hale *v.* Forbis, 3 Mont. 395; Kellogg *v.* Olmsted, 25 N. Y. 189; Olmstead *v.* Latimer, 158 N. Y. 313, 53 N. E. Rep. 5.

[6] Stoudenmeier *v.* Williamson, 29 Ala. 558; Connelly *v.* Devoe, 37 Conn. 570; Holmes *v.* Doane, 9 Cush. 135; Peck *v.* Requa, 13 Gray, 407; Rollins *v.* Marsh, 128

held that the old contract continues in force, since there was not sufficient consideration to make the new agreement binding.[1]

Several cases, which are often cited as examples of the doctrine in question, really rest upon a different ground. The original Massachusetts decision, to which all the later Massachusetts cases as well as the others which take the same view go back, is of this sort. The parties had agreed, the one to build a house, the other to pay a certain amount for it. The parties then agreed to waive the contract price, and the owner agreed to pay what it was worth. The new promise was held binding.[2] The consideration was, however, not the builder's promise to complete, but his agreement to give up his right to the contract price, which might have exceeded the value of the work.[3] In other cases it has been held that if the agreement is legally terminated so that neither side is bound, it is

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Mass. 116; Rogers *v.* Rogers, 139 Mass. 440, 1 N. E. Rep. 122; Thomas *v.* Barnes, 156 Mass. 581, 584, 31 N. E. Rep. 683; Foley *v.* Storrie, 4 Tex. Civ. App. 377, 23 S. W. Rep. 442; Lawrence *v.* Davey, 28 Vt. 264. It will be noticed that no court of last resort except the Supreme Court of Massachusetts has recently so held. On the contrary, while in several states there were earlier decisions the same way (Bishop *v.* Busse, 69 Ill. 403; Cooke *v.* Murphy, 70 Ill. 96; Coyner *v.* Lynde, 10 Ind. 282; Moore *v.* Detroit Locomotive Works, 14 Mich. 266; Goebel *v.* Linn, 47 Mich. 489; Conkling *v.* Tuttle, 52 Mich. 630; Meech *v.* Buffalo, 29 N. Y. 198), these decisions were subsequently overruled, and the law of these states brought into accord with the general common law. Havana Press-Drill Co. *v.* Ashurst, 148 Ill. 115, 35 N. E. Rep. 873; Moran *v.* Peace, 72 Ill. App. 135 (but see Hirsch *v.* Chicago Carpet Co., 82 Ill. App. 234); Reeves Pulley Co. *v.* Jewell Belting Co., 102 Ill. App. 375; Reynolds *v.* Nugent, 25 Ind. 328; Widiman *v.* Brown, 83 Mich. 241, 47 N. W. Rep. 231; Vanderbilt *v.* Schreyer, 91 N. Y. 392; Alley *v.* Turck, 8 N. Y. App. Div. 50, 52, 40 N. Y. Supp. 433 (*semble*); Jughardt *v.* Reynolds, 68 N. Y. App. Div. 171, 74 N. Y. Supp. 152.

In view of the recent current of authority, it may be doubted whether the doctrine stated is law outside of Massachusetts. Of the other jurisdictions from which cases in support of it were cited, there is in Alabama, Connecticut, and Vermont only a single early decision; the other jurisdiction, Texas, is represented by an inferior court only.

[1] Harris *v.* Watson, Pea. N. P. 72; Stilk *v.* Myrick, 2 Camp. 317; Frazer *v.* Hatton, 2 C. B. N. S. 512, 524; Harris *v.* Carter, 3 E. & B. 559; Alaska Packers' Assoc. *v.* Domenico, 117 Fed. 99 (reversing 112 Fed. 554); Blythe *v.* Robinson, 104 Cal. 239, 37 Pac. Rep. 904; Havana Press-Drill Co. *v.* Ashurst, 148 Ill. 115, 35 N. E. Rep. 873; Moran *v.* Peace, 72 Ill. App. 135; Reynolds *v.* Nugent, 25 Ind. 328; Ayres *v.* C. R. I. & P. R. R., 52 Ia. 478; McCarty *v.* Hampden Assoc., 61 Ia. 287; Widiman *v.* Brown, 83 Mich. 241, 47 N. W. Rep. 231; King *v.* Duluth Co., 61 Minn. 482, 63 N. W. Rep. 1105; Lingenfelder *v.* Wainwright, 103 Mo. 578, 15 S. W. Rep. 844; Conover *v.* Stilwell, 34 N. J. Law 54; Vanderbilt *v.* Schreyer, 91 N. Y. 392; Festerman *v.* Parker, 10 Ired. 474; Gaar *v.* Green, 6 N. Dak. 48, 68 N. W. Rep. 218; Robb *v.* Mann, 11 Pa. St. 300; Erb *v* Brown, 69 Pa. St. 216; Nesbitt *v.* R. R., 2 Speers, 697, 709.

[2] Munroe *v.* Perkins, 9 Pick. 298.

[3] See to the same effect Cutter *v.* Cochrane, 116 Mass. 408.

then possible to make a new bilateral contract in such terms as the parties choose.[1] This is all the clearer if both sides of the new contract differ from those of the old.[2]

The new agreement is also binding where the party in whose favor the modification was made had a right to refuse to perform the first contract; as for instance, if he had a right to avoid it for misrepresentation or mistake,[3] or for non-performance of a condition,[4] or had a right by the terms of the contract to put an end to it upon notice.[5] So where he waived a right to delay performance.[6] And according to the general principle if one party *bona fide* claims the right to avoid, though that right is disputed, the relinquishment of the claim is sufficient consideration to make binding a promise by the other party.[7] The Massachusetts doctrine is obviously exceptional, and has been sufficiently criticised elsewhere.[8]

Where there is an existing contract with a third person, the objections just urged do not exist. The promise is necessarily an assent to a *new* agreement, and therefore may be a consideration; and while it is the duty of the party to keep his prior contract, he is under no duty to enter into an agreement with a third party to keep it. His agreement to keep the prior contract is therefore a good consideration for a new promise of a third party.[9]

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[1] Harris *v.* Carter, 3 E. & B. 559; Hart *v.* Lauman, 29 Barb. 410; Butler *v.* Publishing Co., 54 N. Y. App. Div. 382, 66 N. Y. Supp. 788.

[2] Harrod *v.* S., 24 Ind. App. 159, 55 N. E. Rep. 242.

[3] Bean *v.* Jay, 23 Me. 117; Osborn *v.* O'Reilly, 42 N. J. Eq. 467, 9 Atl. Rep. 209; Keeney *v.* Mason, 49 Barb. 254.

[4] Grant *v.* Duluth Co., 61 Minn. 395, 63 N. W. Rep. 1026.

[5] Spangler *v.* Springer, 22 Pa. St. 454.

[6] King *v.* Duluth Co., 61 Minn. 482, 63 N. W. Rep. 1105.

[7] Michaud *v.* MacGregor, 61 Minn. 198, 63 N. W. Rep. 479.

[8] 8 HARV. L. REV. 30. To Professor Ames's reply, that the agreement should be supported unless it contravenes public policy, it may be answered first, for the reasons already given, such an agreement, being a breach of legal duty on the part of one party, always contravenes public policy; second, the ground of policy has been distinctly negatived by Lord Ellenboro in Stilk *v.* Myrick, 2 Camp. 317; third, that the authorities do not enforce such an agreement even in a case where the offer was made by the new promisor without solicitation by the benefited party (Frazer *v.* Hatton, 2 C. B. N. S. 512, 524); fourth, that most of the authorities which follow the Massachusetts doctrine confine it to cases where the benefited party has refused to go on, and thus made it necessary for the other to secure performance by the new promise; in other words, where the new promise has been obtained by coercion.

[9] Bagge *v.* Slade, 3 Bulst. 162; Goring *v.* Goring, Yelv. 11; Scotson *v.* Pegg, 6 H. & N. 295; Humes *v.* Decatur Co., 98 Ala. 461, 473; Merrick *v.* Giddings, 1 Mack. 394; Abbot *v.* Doane, 163 Mass. 433, 40 N. E. Rep. 197; Avondale Marble Co. *v.* Wiggins, 12 Pa. Super. 577; Cobb *v.* Cowdery, 40 Vt. 25; Green *v.* Kelley, 64 Vt. 309, 24 Atl. 133; Reynolds *v.* Jacobs, 10 N. S. W. L. R. 268. A dictum *contra* in Jones

Professor Williston, in the article referred to, while agreeing that the promise is a consideration, urges that it is not a valid consideration unless the thing promised would be a consideration (a detriment); and therefore that in neither case just discussed would there be a binding contract. For, he argues with great force, if the act itself would not be a detriment the promise to act can be no consideration; the promise cannot be more than the thing promised. If this is true, we have for the first time a necessary difference in result between the two theories of consideration.

Let us examine the position of the respective parties to the two agreements, and see whether it is true that a promise to act cannot be a greater or better consideration than the act itself. What does the promisee get by the promise? He gets the assurance to him, by reason of the agreement, that the thing will be done. He asks for the promise because he desires this assurance; and he gets by it what he gets in every case of bilateral agreement. It is true that the promisor would in all probability do the act in any case, as a result of his prior contract; but the promisee desires not probability but personal assurance. In an ordinary case a bilateral agreement is none the less binding because the promisor would probably have done the thing promised though the agreement had not been made. On the other side, what does the promisor give in the one case that he does not give in the other? He yields his assent to a new arrangement, comes into a new relation with a new party, gives another man such control over his acts and affairs as any agreement gives. After performance the position of the parties is the same, whether the promise is made or not; but

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v. Waite, 5 Bing. N. C. 341, 351, is of course overruled. Two or three American cases are or seem opposed to the general current of authority. If so, they are following a mistaken analogy; that is, they rest on cases where it is held that a promise to the other party to an obligation to perform it is no consideration. The first of these cases is Barrington *v.* Ryder, 93 N. W. Rep. 56 (Ia.). This case may perhaps rest upon a distinction between a good consideration to support a contract and a valuable consideration to validate a gift and prevent a resulting trust. Another case, Sherwin *v.* Brigham, 39 Oh. St. 137, is undoubtedly opposed to the current of authority. The plaintiff having signed certain notes for the accommodation of the defendant's brother, the defendant agreed to honor drafts to be drawn upon him by the plaintiff upon the plaintiff's agreement to use the money obtained from the drafts in paying the notes. The court held the promise of the defendant to be without consideration. The case is clearly wrong, apart from the question under discussion; for though the plaintiff was legally bound to pay the notes, he was not bound to pay them out of any particular fund, and his promise was therefore to do a thing which he was not already bound to do, even to a third party. *Dicta* to the same effect may be found in Ellison *v.* Water Co., 12 Cal. 542; Ford *v.* Crenshaw, 1 Litt. 68.

between offer and performance the position of the promisor is that of one who has agreed to insure his own act.

This view is perhaps strengthened by a class of cases where a promise is clearly a valid consideration, though performance would not be; cases, to wit, where one promises the happening of a future event over which he has no control. I agree that a horse which I sell shall be sound, or shall win a race; or that a man shall pay his debts; or that a ship shall come safe to port: in all these cases my promise is a valid consideration for a counter-promise. Yet the soundness or speed of the horse, the solvency of the third party, or the safety of the ship could not be a valid consideration for a promise made to me.

The distinction made by the decisions between a promise to a party to the existing obligation and one to a third party seems quite in accordance with the accepted notions of consideration and of obligation; and it is neither unfair nor impolitic. Nor is it an objection to the distinction that it has the support of Professors Langdell and Ames and of Sir Frederick Pollock.

Joseph H. Beale, Jr.

THE POWER OF CONGRESS OVER COMBINATIONS AFFECTING INTERSTATE COMMERCE.

THE question of the relative rights of the legislatures of the several states and the Congress of the United States in the regulation of contracts, combinations, conspiracies, and monopolies in restraint of trade and commerce, popularly termed trusts, has recently been brought prominently to the public notice. It has been affirmed that an amendment to the Constitution of the United States is necessary in order to vest in Congress the requisite power to enable it to deal with the subject. Among others, the President has been quoted as suggesting that such an amendment might prove to be necessary. It is the purpose here to demonstrate that there is already existing in Congress a large and extensive power, which it is believed is sufficient without the amendment proposed, and, further, to define the extent of that power. In order that this object may be attained it is first necessary to outline the state of the law and the course of the decisions of the courts as they stood before the enactment of statutes by Congress and by the legislatures of the several states concerning the subject; then to discuss the existing statutes, particularly the so-called Sherman Anti-Trust Act and its construction by the courts, and finally to point out what may yet be accomplished by Congress in regulating industrial combinations by the exercise of its existing constitutional power.

It was held at common law that those combinations and contracts which were in unreasonable restraint of trade were void. The courts refused to enforce such contracts. No penalty, however, was imposed upon the parties. All contracts and combinations in restraint of trade were not invalid. The Supreme Court of the United States, in delivering its opinion in the case of the United States *v.* The Trans-Missouri Freight Association,[1] said, speaking through Mr. Justice Peckham:

"A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere."

[1] 166 U. S. 290.

Public policy was not deemed invaded by contracts, although in restraint of trade, which were limited in their operation with reference to time or space or persons.[1] No hard and fast rule can be laid down in order to determine what contracts in restraint of trade would have been held to be unreasonable and therefore void. The question was in each instance one for the court having the contract before it, and was considered by it with reference to all the circumstances of the case.

At common law, although a contract might be held to be in unreasonable restraint of trade and although its result might be to effectually prevent and stifle competition, yet no penalty was imposed upon the parties to the contract, and no action lay against them by one who was by reason of the contract prevented from successfully competing with the combination formed by the contract. In Mogul Steamship Co. *v.* McGregor[2] Mr. Justice Bowen said:

"Lastly, we are asked to hold the defendant's conference or association illegal, as being in restraint of trade. The term 'illegal' here is a misleading one. Contracts, as they are called, in restraint of trade, are not in my opinion illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines after they have been made to recognize their validity. . . . The substance of my view is this, that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation . . . gives rise to no cause of action at common law."

Furthermore, a contract in restraint of trade, which would be valid at common law because limited in time or space or persons, might result in the establishment of a virtual monopoly and one which might now well be considered as seriously inimical to the public interest and welfare.[3]

The increase manifested for the past twenty years in the formation of large enterprises in this country and in the consolidation and combination of interests is clear. These combinations have taken two main forms: First, those whose professed object is the maintenance of reasonable rates among the individuals or corporations who are parties to the agreement and the suppression of

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[1] Dendy *v.* Henderson, L. R. 11 Ex. 19; Leather Cloth Co. *v.* Lorsant, L. R. 9 Ex. 345.

[2] 21 Q. B. D. 544.

[3] See Diamond Match Co. *v.* Roeber, 106 N. Y. 473.

what had proved to be ruinous competition among them; and, second, those whose object is, by means of the establishment of a virtual monopoly, to raise and maintain prices. It is believed that many of these combinations result in benefit and not in harm to the public at large, and it is therefore at their regulation and not at their complete annihilation that legislation should be directed.

The tendency of the decisions in determining whether a given contract in restraint of trade was an unreasonable one, instead of being towards broadening the rule so as to result in a more effectual regulation of combinations, was towards making the rule more narrow. In Matthew *v.* Associated Press [1] the court said:

"The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. The courts . . . now hold many contracts not open to the objection that they are in restraint of trade, which a few years back would have been avoided on that sole ground, both here and in England."

In order to remedy the defects in the common law as applied to our modern industrial "trusts," so-called anti-trust statutes have been enacted by the legislatures of many states of the Union. The legislature of a given state being, however, necessarily prevented by its inherent nature from enacting laws which have an extra-territorial operation, the state anti-trust statutes have been found to be inadequate to deal with, prevent, and regulate the evils arising and growing out of many of these combinations.

The question therefore naturally arises as to the power of the Congress of the United States, by constitutional legislation, to satisfactorily legislate so as to regulate the varied and complex combinations of capital existing at this time. It is provided by article 1, section 8, clause 3, of the Constitution of the United States that "the Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

The government of the United States is one of powers delegated to it by the states of the Union and enumerated in the Constitution. It is expressly provided by the Tenth Amendment to the Constitution of the United States that "the powers not delegated to the United States by the Constitution, nor prohibited by

[1] 136 N. Y. 333.

it to the states, are reserved to the states respectively or to the people." This reservation of power in the several states is not, however, intended to abridge or cripple in any manner the authority of the general government in carrying into effect the powers conferred upon it. By article 1, section 8, clause 18, of the Constitution, it is provided that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States." This clause was inserted in the Constitution not because Congress would not have possessed such authority in its absence, but merely to remove from any possible doubt any question that such power existed. The powers conferred by the Constitution are sovereign in their nature, granted to create a sovereignty with governmental powers. With such a sovereignty in mind, it was not the intention of the framers of the Constitution to confer powers which should be subject to strict construction and narrow limitations. Each of the powers conferred was to be complete in itself. Congress was not to be hampered by inability to legislate upon subjects which, if not regulated, might interfere with the full efficacy of other legislation by it. Congress is not limited to the enactment of laws which are an exercise of the express powers conferred upon it. It also has power to pass laws which are reasonably necessary to carry into effect its express powers.

In pursuance of the authority conferred by the commerce clause of the Constitution, Congress, on July 2, 1890, enacted the law entitled "An act to protect trade and commerce against unlawful restraints and monopolies."[1] This act is commonly called the Sherman Anti-Trust Act. In order to determine whether the power of Congress under the commerce clause has been ex-

[1] 26 Statutes at Large 209. Section 1 declares that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 2 declares that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. . . ."

hausted by the enactment of this statute, it is first necessary to discuss and state the scope and operation of the Act, as declared by the Supreme Court.

In two important respects the common law was altered by this statute. In the first place, every contract, combination in the form of trust or otherwise, or conspiracy, in direct restraint of trade or commerce, among the several states, whether reasonable or unreasonable, is declared void; and, secondly, not only is such a contract unenforceable upon a suit instituted by one of the parties to the contract, but a penalty is imposed upon the parties. In United States *v.* Trans-Missouri Freight Association,[1] the combination assailed was an agreement among several interstate railways. By the agreement a method was provided of fixing rates on competitive interstate freight traffic south and west of the Missouri River. The agreement declared that the Association was formed "for the purpose of mutual protection by establishing and maintaining reasonable rates. . . ." The court said,[2] speaking by Mr. Justice Peckham:

"The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do."

In United States *v.* Joint Traffic Association[3] the court held that there was no substantial difference between the combination there under consideration and the Trans-Missouri agreement, and that Congress had power to say that no contract or combination shall be legal which restrains interstate trade or commerce by shutting out the operation of the general law of competition.

The Attorney-General of the United States, Mr. Knox, has

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[1] 166 U. S. 290 (1897). [2] P. 340. [3] 171 U. S. 505.

recently very ably and forcibly expressed his disapproval of the Sherman Anti-Trust Act, as construed by the Supreme Court, in that combinations in restraint of trade, even though they be reasonable, fall within its condemnation. In an address delivered by Mr. Knox at Pittsburg, Pennsylvania, in referring to the distinction between contracts in reasonable and those in unreasonable restraint of trade, it is suggested that

"in extending the law it might be deemed wise by Congress now to import and impose this distinction clearly, for the following reasons, among others: Because the hard and fast extreme rule may work injustice in various instances where a moderate restraint is either not harmful at all to the general interests or only slightly so in comparison with the importance of the freedom and sacredness of many contracts which public policy does not manifestly condemn; because the question of reasonableness, as in the common law, should be for the courts — surely the safest arbiter and reliance in human disputes — and because, from the economic standpoint, freer play would thus be given, and perhaps 'a way out' indicated, in the conflict between the important principles of free competition and combination."

A question, and a very broad and troublesome one, here arises: whether it would be wise, as suggested, to eliminate from the operation of anti-trust statutes all contracts which would have been held reasonable at common law; for many contracts which were reasonable at common law, merely because in some slight degree limited in time or space, and which would for that reason have been held valid, might still result in restraints, monopolies, and conspiracies fully as harmful as other combinations which would, because of not being so limited, have been held void. This, however, is a question of expediency.

From the above decisions it will be seen that, as applied to a contract in direct restraint of trade among the states, the provisions of the Sherman Anti-Trust Act are extremely drastic in their nature, inasmuch as such contracts are void whether reasonable or unreasonable. Yet the Act is greatly limited in its operation, since, in order that a given contract shall fall within its condemnation, the contract must be determined to be in direct restraint of trade or commerce among the states.

The most recent decision under the Sherman Anti-Trust Act is that recently handed down by the United States Circuit Court of Appeals in the case of the United States *v.* The Northern Securities Co. *et al.* In that case suit was instituted by the Government under the Sherman Anti-Trust Act for the purpose of

dissolving the merger, resulting from the creation of the Northern Securities Company, which had been organized to hold the stock of two competing trans-continental railways and to issue its own stock in lieu thereof. The court, speaking through Mr. Justice Thayer, held that the Northern Securities Company was, within the provisions of the Anti-Trust Act, a combination in restraint of trade and commerce among the several states. The validity of this decision may well be doubted. The Sherman Anti-Trust Act was aimed at contracts, combinations, and conspiracies in restraint of trade or commerce among the several states. The obvious distinction between the Trans-Missouri Freight and the Joint Traffic Association agreements and the Northern Securities merger is that the combinations in the two former cases had as their express object the maintenance of agreed rates. The direct result contemplated was a restraint of trade, and each of those agreements showed on its face that it was entered into for that purpose. Something more was accomplished by them than the vesting of power, in the parties to the agreements, to create such a restraint. By the terms of the very instruments creating these combinations, a course was agreed upon which, if followed, would inevitably accomplish that result. The statute was aimed at a combination which is, and not at one which may become, one in restraint of trade. In the Northern Securities case, a combination was created, but nothing further. Its necessary result was not a restraint of trade, although that would be its almost inevitable effect. It is almost indisputable that the railway companies in the Northern Securities Case would have been operated by one body of men so as to stifle competition between the companies. Such a result, however, could not certainly be foretold. It is perfectly possible that the Securities Company might have elected different sets of directors and the roads might have been operated as if the stockholders were distinct. In short, the combination declared to be within the statute, aside from the fact that it was "a combination," seems no more contrary to the provisions of the law than would be the acquisition by the same men of the stock of the two roads. The practical result in the two cases would be exactly the same. In other words, no object was expressed upon which could be predicated an intention of so dealing as to render the combination a restraint of trade, and the necessary effect of the merger was not to bring about that result. A restraint of trade would be, as the Supreme Court said

in the case of United States *v.* E. C. Knight Co.,[1] an indirect result, however inevitable and whatever its extent might be, and that result would not necessarily determine the object of the combination.

In any event, it has been conclusively determined by the Supreme Court of the United States that the Sherman Anti-Trust Act relates only to those contracts, combinations, and conspiracies whose direct and not whose indirect result is to restrain trade or commerce among the several states.

In the case of the United States *v.* E. C. Knight Co., the United States exhibited a bill in equity for the purpose of enjoining the so-called "Sugar Trust." The bill was dismissed by the Circuit Court of the United States, and the decision of that court was eventually affirmed by the Supreme Court. It appeared that the American Sugar Refining Company had acquired almost absolute control of the sugar-refining industry of the United States and of the manufacture of refined sugar. It was contended by the Government that the object of the combination was the establishment of a virtual monopoly in a necessary of life, and that its effect was to restrain and monopolize interstate and foreign commerce. The court, however, held that manufacture was not a part of commerce, and that, although a monopoly in manufacture be created and although a monopoly in sale might follow, yet that its effect upon interstate commerce was indirect and incidental and that it was not within the Sherman Anti-Trust Act. The court said, speaking through Mr. Justice Fuller:

"Doubtless, the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not a primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it. . . . Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy."

In this case nothing more was decided than that a monopoly of manufacture was not within the statute and, therefore, was not void.

[1] 156 U. S. 1.

In Hopkins *v.* United States[1] a bill in equity was filed by the United States against the defendant, Hopkins, and the other members of the Kansas City Live Stock Exchange, asking a decree that the Exchange be dissolved on the ground that it was a combination in restraint of commerce among the several states. The Exchange was an association doing business at the Stock Yards in Kansas City, a part of which were in Missouri and a part in Kansas. The business of the members was to receive live stock shipped from other states, care for and sell the same and account to the owners for the proceeds, after deducting charges and expenses. Members were prohibited from buying live stock from commission merchants in Kansas City who were not members of the Exchange. By the rules, a commission was fixed, the employment of agents to solicit consignments was prohibited except upon a stipulated salary, and the sending of prepaid telegrams or telephone messages with information as to the condition of the markets was forbidden. The Supreme Court held that the business conducted by the members of the Exchange was not interstate, but was local in character, and that the association was not a combination in restraint of commerce among the several states. The court said, at page 592: "The contract condemned by the statute is one whose direct and immediate effect is restraint upon that kind of trade or commerce which is interstate." In Anderson *v.* United States[2] a similar association was assailed, but the Supreme Court held, in accordance with the opinion in the Hopkins case, that the effect of the combination was not a direct restraint upon commerce among the states and, therefore, that it did not fall within the Sherman Anti-Trust Act. In none of these cases was the court called upon to define, and it did not declare, the limits of the power of Congress to legislate under the commerce clause of the Federal Constitution. It was merely determined by the court, that, in order that a particular contract should fall within the condemnation of the statute, its direct and immediate effect must be to restrain commerce among the states.

This construction of the Act being established, the power of Congress to regulate monopolies and contracts, combinations and conspiracies in restraint of trade was by no means thereby exhausted, and, as shown above, the Supreme Court has not so declared.

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[1] 171 U. S. 578.

[2] 171 U. S. 604.

In considering the power of Congress, several points must be remembered: First, no limitation of the power can be derived from the purpose for which it is exercised. As was said by Chief Justice Marshall, in Gibbons *v.* Ogden:[1]

"Of course, there is no limit to the power to be derived from the purpose for which it is exercised. If exercised for one purpose, it may be also for another. No one can inquire into the motives which influence sovereign authority. It is enough that such power manifests its will."

Secondly, with the policy of legislation and with its wisdom the courts are not concerned. The question before the court is as to the existence of the power to enact the particular law. Mr. Justice Washington, in the case of the United States *v.* The Brigantine William,[2] in referring to the validity of an act of Congress under the commerce clause of the Constitution, said: "I say nothing of the policy of the expedient. It is not within my power." Thirdly, the existence of a clear and well-recognized distinction between legislative and legal discretion. The court should declare an act of the legislature void as being in excess of its power only in cases where its unconstitutionality is clearly demonstrable. Chancellor Kent, in the case of Livingston and Fulton *v.* Van Ingen,[3] said, referring to the validity of the legislative acts there under consideration:

"In the first place, the presumption must be admitted to be extremely strong in favor of their validity. There is no very obvious constitutional objection, or it would not so repeatedly have escaped the notice of the several branches of the government, when these acts were under consideration. . . . It ought not to be any light or trivial difficulty that should induce us to set them aside. Unless the court should be able to vindicate itself by the soundest and most demonstrable argument, a decree prostrating all these laws would weaken, as I should apprehend, the authority and sanction of law in general, and impair, in some degree, the public confidence, either in the intelligence or integrity of the government."

The limit of the power of Congress over commerce has never yet been stated, and it never will be accurately. While its scope is always the same, yet the court must in each case declare that that case is either within the power or is not comprehended by it. The Supreme Court, in the Passenger Cases,[4] said:

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[1] 9 Wheat. (U. S.) 1.
[2] 2 Hall's Am. Law Journal 255.
[3] 9 John. Rep. 572.
[4] 7 How. 283 at p. 402.

"No one has yet drawn the line clearly, because, perhaps, no one can draw it, between the commercial power of the Union and the municipal power of a state. Numerous cases have arisen, involving these powers, which have been decided, but a rule has necessarily been observed as applicable to the circumstances of each case. And so must every case be adjudged."

Since the economic conditions and commercial transactions of the United States must, in view of its daily progress in the world of business, constantly change in extent and nature, it may very reasonably be supposed that, as the body of our commerce grows more complex, so will the necessity for the regulating power of Congress be more apparent; and therefore it is believed that the Supreme Court, governed by these considerations of necessity, will be more and more apt and ready to declare enactments of increasing breadth of application over affairs of commerce within the province and control of Congress.

"Commerce" is a very broad and comprehensive term, and in this age no word is more inclusive. Almost all the transactions of life are connected with it, if not directly, at least incidentally. Its welfare affects the progress of the nation and its civilization, and in a multitude of forms exercises a controlling influence over the daily life of its citizens and their happiness. That part of this broad subject, commerce, which is described as "commerce among the states," has been confided to Congress for regulation. It is now settled beyond question that as to transactions of distinctly interstate commerce the power of Congress is exclusive, and that legislation in regard thereto by the states contravenes the commerce clause of the Federal Constitution, and is void even in the absence of congressional legislation upon the particular subject. If the transaction is not within the exclusive power of Congress, it lies within the controlling power of the states in the exercise of their police powers. This control by the states is, however, subject to the power of Congress, in regulating commerce, to enact laws concerning the same subject-matter, and in order that the will of Congress when manifested may be supreme over the legislation of the several states, it is provided by clause 2, of article 6, of the Constitution of the United States, that the laws of the United States made in pursuance of the Constitution shall be the supreme law of the land.

It may be confidently affirmed that the power of Congress does not stop at the boundary line of a state, and that it may extend

into the states and operate directly upon matters and transactions carried on therein. The Supreme Court, in the case of United States *v.* Coombs,[1] said: "It does not stop at the mere boundary line of a state, nor is it confined to acts done on the water or in the necessary course of navigation."

Again, it is clear that the power may reach and apply to an agency, subject, or means, although it be entirely within the limits of the state. This was expressly determined by the decision in the case of The Daniel Ball.[2] In that case a steamer was employed in transporting goods on the Grand River, within the limits of the State of Michigan, some of the goods being destined for other states and some being brought from without the limits of Michigan and destined to points within that state. The court held that the steamer was engaged in commerce between the states, and however limited that commerce was, so far as it went it was subject to the legislation of Congress. The court said:

"It is said that if the position here assumed be sustained, there is no such thing as the domestic trade of a state; that Congress may take the entire control of the commerce of the country and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market. . . . And we answer . . . that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a state, and leaving it at the boundary line at the other end, the Federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."

If Congress were prevented from acting upon subjects merely because they are wholly within the territorial limits of a state, even though their regulation be deemed necessary, in order to properly govern commerce among the states, the power of Congress would be subverted and hampered. If the Constitution were so construed, the result in many cases would be that, by the very clause conferring the power, the exercise of that power would be so fettered as to render the clause, instead of a grant of power, a provision that such power shall not be exercised.

[1] 12 Peters 72.

[2] 10 Wall. 577.

Finally, it is believed that Congress has power of regulation over any transaction, cause, or thing whatsoever within the limits of these United States, including the internal commerce of a state which may be reasonably regarded by it as deleterious to interstate commerce. The power is given to regulate. Regulation means government. Government implies action in a manner that controls. To control, one must possess the power to control and the means to enforce that power. The power conferred is governmental. It imports as necessary to its efficacy the right to direct the entire matter to which the power relates. Power to control a given subject includes by necessary implication the right by legislation to promote and restrict it and to destroy or regulate any factors or causes which may disturb or injuriously affect it. The court, in Gibbons *v.* Ogden,[1] in answer to the question, "What is this power?" said:

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

Congress, though restricted to the regulation of commerce among the states, is not precluded, in so regulating that commerce, from enacting laws concerning other subject-matters than what may be termed transactions distinctively of interstate commerce, and the acts, means, mediums, and subjects of that commerce. Regulation "*ex vi termini* implies harmony and uniformity of action." How can Congress regulate interstate commerce, if it has not the power of control over such matters as it may consider incidentally affect it? The commerce of this country may be considered as a very complex unit. Disease in the smallest nerve in the body of commerce may affect the health of the entire body or the health of any other portion of the body. Evils in the internal commerce of a state may disturb the welfare of the entire body of commerce, including that between the states. There cannot, in

[1] 9 Wheat. (U. S.) 1, 196.

commerce among the states, be harmony and uniformity if Congress is without the power to remedy any evil which may affect it.

That Congress may legislate concerning the internal commerce of a state, when reasonably necessary to enable it to exercise its power of regulation or control, is affirmed by that ablest and most far-sighted of all the expounders of our Constitution, Chief Justice Marshall. In Gibbons *v.* Ogden he said:

"It is obvious that the government of the Union, in the exercise of its express powers, — that, for example, of regulating commerce with foreign nations and among the states, — may use means that may also be employed by a state in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. . . . All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinguished to establish their individuality."

It is thus recognized that, while the states are entitled to legislate, in the exercise of their police power, concerning their internal affairs, yet Congress may, in the exercise of its acknowledged powers, legislate concerning the same subject matter, and perhaps use the same means to accomplish its object that might be invoked by the legislature of the state.

In the same case the Chief Justice said, in defining the powers of Congress, that it had no power to act upon those internal concerns "which do not affect other states and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government." By this statement it is affirmed by strong negative implication that Congress has power over such internal concerns when they do affect other states, and also over those with which it is necessary to interfere for the purpose of executing some of the general powers of the government. The extent to which these concerns shall affect other states is not stated, but the construction of the word "necessary" must not be a narrow one. As has been shown above, the court must not declare that an enactment of Congress is void because the subject aimed at does not affect other states, unless it could on no reasonable theory be so considered. The same rule is applicable in determining whether it is necessary to interfere with a given subject in order to execute some general power of gov-

ernment. The word "necessary" does not purport absolute necessity, but what Congress might rationally deem reasonable necessity. This construction is further supported by the statement of the court in the case of United States *v.* Coombs.[1] The Supreme Court there said that any offense which

"interferes with, obstructs or prevents such commerce and navigation, though done on land, may be punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers."

Any evil, even though it be one purely within the confines of a state, which affects commerce among the states, which retards or injures or in any manner burdens that commerce, falls within the power of Congress. It cannot be said that Congress, having in view the welfare of its people individually and as a whole, is so impotent as not to be able to prevent, restrain, or regulate transactions which only indirectly affect and injure commerce and trade among the states. There can be regulation of nothing by anybody, individual or government, in the absence of power to destroy, if need be, anything which conflicts with the harmony and government of that thing.

The power of Congress under the commerce clause of the Federal Constitution, in dealing with contracts, combinations, and conspiracies in restraint of trade among the states, is not limited to regulations of direct restraints of trade and commerce among the states, but also extends to any indirect restraints, no matter to what extent removed, which might reasonably be considered by Congress to affect that commerce. And the question is not as to the policy of the expedient adopted. The sole question for the court is the dry one: Can this affect commerce among the states? A few instances illustrating the consequences of holding that such power is not possessed by Congress will bring into sharper relief the necessity for its existence in Congress and render the conclusion more easy that it is not lacking under the Constitution.

Take a corporation resident in New York, controlling the manufacture in that state of a certain product, not shipping its product outside the state nor desiring so to do, but by its efforts first stifling the small dealer and then raising prices over the large area of that state. Such a course of dealing may, with much reason, be considered as injuriously affecting commerce among the states.

[1] 12 Peters 72.

It is clear that the legislature of a given state cannot grant a monopoly of trade so as to prevent by positive law competition through interstate shipments by those outside the state with the monopoly within the state. Such a grant would seriously affect commerce among the states. In Brimmer *v.* Rebman, Mr. Justice Harlan said:[1]

"Undoubtedly a state may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers or of enacting inspection laws, make discriminations against the products and industries of some of the states in favor of the products and industries of its own or of other states. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the rights under the constitution to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere . . . Any local regulation which in terms or by its necessary operation denies this equality in the markets of a state is, when applied to the people and products and industries of other states, a direct burden upon commerce among the States, and, therefore, void."[2]

If this result cannot be reached by the sanction of the prohibitive law of a state, on the ground that it would be a regulation of interstate commerce not within the power of the state, it follows as being by no means an unreasonable proposition that the establishment of a virtual monopoly may in some large degree, even if not to the same extent as a legal monopoly, affect and injure commerce among the states. Its effect upon the small dealer and upon competition with the monopoly would not be confined to those individuals and corporations within the territorial limits of the particular state, but would extend beyond its boundaries and discourage interstate shipments of the commodity in question. In like manner, interstate shipments by those within the state who had been "squeezed out" by the monopoly would, by reason of the destruction of their business, be cut off and put to an end.

Again, were Congress without such power, every state would have the power and each might well establish regulations which might be regarded by them as best suited to obviate the particular

[1] 138 U. S. 78.

[2] See also Bowman *v.* Chicago & N. W. Ry. Co., 125 U. S. 465.

evil. Such regulations they would undoubtedly put into effect, even though their modes of reaching the desired result might be entirely different from the mode that Congress might choose, having in view the whole country and the deleterious effect which the evil might occasion not only the commerce within a particular state, but commerce among the states. In short, uniformity of regulation might, with wisdom, be thought necessary, even though the matter affected commerce among the states only indirectly and in a remote degree.

It has been held by the Supreme Court of the United States, in the decision of United States *v.* E. C. Knight Co., referred to above, that a monopoly of manufacture is not one of commerce, and that since such a monopoly only indirectly restrains commerce among the states it does not fall within the Sherman Anti-Trust Act. In regard to the regulation of such a monopoly of manufacture, it cannot be doubted that the power of Congress extends further than does that act. The natural tendency of a monopoly of manufacture is towards a monopoly of sale. The line between the two forms of monopoly is not one of substance, but rather one of definition, and if it is seen that the almost inevitable tendency of the one is to result in the other, it must lie in the power of Congress, in its wisdom and discretion, to declare that which is found in practice to produce a certain result, which result is contrary to the public policy of the nation, also contrary to that policy, and declare the cause illegal.

A doubt has been expressed above as to the decision of the Circuit Court of Appeals in the case of the United States *v.* The Northern Securities Co. Whether or not the Securities Company did fall within the provisions of the Sherman Anti-Trust Act, it is believed that there can be no reasonable doubt that Congress, under its power to regulate commerce among the states, can enact a law to prevent such a merger as was attempted in that case. It needs no argument to demonstrate that the combination in the Securities case might, and probably would, have been so conducted as to restrain commerce among the several states and destroy competition between the competing lines of railway. The point arises, whether an act of Congress aimed at the regulation or prevention of such a combination would operate as a deprivation of liberty or property without due process of law, within the meaning of the Fifth Amendment to the Constitution of the United States. In the case of the United States *v.* Addystone

Pipe & Steel Co.[1] it was held that this constitutional provision is subject to the right of Congress to regulate direct restraints of trade and commerce among the states. It was in that case determined that the restraint there under consideration was a direct restraint, and it was therefore held that the act, as applied to the combination there assailed, did not operate as a deprivation of liberty or property without due process of law. The question whether the act, as applied to combinations not in direct but only indirect restraint of trade, would so operate was not necessarily involved or decided. It has been held that the anti-trust statutes enacted by several of the states of the Union do not operate as such a deprivation of liberty or property. In the case of The State *v.* The Fireman's Fund Insurance Co.[2] the constitutional validity of the anti-trust statute of the State of Missouri was brought into question. That statute provided that "any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state . . . which shall enter into . . . any pool, trust, agreement, confederation or understanding with any other corporation, . . . person or association of persons to regulate or fix . . . the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price," should be subject to a penalty. The court held that this statute did not constitute a deprivation of liberty or property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States. The court said:[3]

"There is no more merit in this contention than there would be that a law was unconstitutional which prohibited two or more persons from conspiring to commit murder or burglary, or any other felony. There is no such thing in civilized society as the unrestrained power to contract. Every man surrenders some of his individual rights when he associates with or becomes a part of any society or government, and the power of the government to legislate is complete; so that, while according to every man the fullest liberty to do what he pleases with his own, he must not interfere with the same rights of others. This principle underlies and runs through all governments and societies. . . ."

The same principle was affirmed in Walters-Pierce Oil Co. *v.* The State of Texas,[4] where the validity of the Texas anti-trust

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[1] 175 U. S. 211.
[2] 152 Mo. 1.
[3] P. 47.
[4] 19 Tex. Civ. App. 1.

statute under the Fourteenth Amendment was under consideration. The court said that the regulation of combinations fell within the power of the state to legislate for the welfare of its people, and added:

"This is one of the inherent rights of sovereignty, and it is as much in place that it should be exercised where the public interest requires as it is the duty of the state, by stringent laws, to protect society from the depredations of a thief or the ravages of a murderer. . . . By adequate laws looking to the suppression of evil, the state . . . must necessarily restrain the unbridled license of the citizen in his conduct and use of property, and restraints imposed in this way have never been held to illegally impair his liberty. . . . The freedom of speech, the liberty of person and life itself must be surrendered where the public interests and the order of good government so require. The liberty of the citizen, which embraces the legal right to his property and to lawfully contract concerning it, stands on no higher ground."[1]

If Congress has power to legislate concerning combinations which only incidentally affect interstate commerce and over which the states have power of regulation, in the absence of regulation by Congress, and if, as has been decided, the states are not prohibited from so legislating, on the ground that such legislation would operate as a deprivation of liberty or property without due process of law, then manifestly such an act by Congress would not be void for that reason; for such an act would not be invalid to any greater extent, under the constitutional provision denying to Congress the right to so legislate as to deprive any person of liberty or property without due process of law, than it would be under the Fourteenth Amendment to the Constitution, which declares that no state shall so legislate as to so deprive any person of liberty or property. If Congress, in the exercise of its legislative discretion, should deem it proper to prohibit for the welfare of commerce among the states such a combination of interests as was attempted in the Northern Securities merger, it cannot be reasonably contended that the rights of individuals or corporations in the acquisition of property and in the making of contracts should not be subject to the higher rights of the public.

Numerous other instances which space does not allow might be cited to sustain the contention made above as to the extent of the power of Congress under the commerce clause of the Constitution.

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[1] See also The State *v.* The Buckeye Pipe Line Co., 61 Oh. St. 520.

As incident to this power of regulation, it is believed that Congress may call to its aid any means that may enable it to act intelligently with a due regard for the rights of the individual and the public and within its constitutional power. One great aid towards this result will be the requirement of publicity in regard to the dealings of individuals and corporations engaged in the carrying on of transactions which may be reasonably considered to be deleterious to the interests of commerce or which may be reasonably regarded as affecting it.

In defining the cause which affects commerce among the states, and which is for that reason subject to the regulating power of Congress, we cannot say that only direct causes are included and that indirect causes are excluded. We cannot proceed, as do the courts in defining liability for a tort, and declare that only the direct cause will be regarded and that the remote will be disregarded. We cannot assert that the *sine qua non* has no place in our calculations, on the ground that if the cause is nothing more it cannot be considered, and that we require the proximate cause. This we cannot do, because we are dealing with a sovereign power, plenary in its character. That the members of the legislative body may not in some cases have such wisdom and foresight as their constituents wish, is no argument against the existence of this sovereign power. Wisdom must be imputed to the legislative body. The fact that a particular agreement or transaction may only in the most remote sense affect interstate commerce will not be sufficient to enable the court to declare it beyond the power of Congress. All matters which might govern the deliberations of Congress in the enactment of a particular law must be weighed: if not the present effect of the evil sought to be eradicated, then its possible future effect, if allowed to proceed undisturbed; if only a small matter now, its possible greatness in the future. If commerce among the states be affected only incidentally by a particular matter, and if that matter could never become one which would affect it to a greater degree, then it must be considered how many matters of an exactly similar nature exist and the evil which would result from all of them combined, had Congress not the power to control and regulate them. Great latitude must be accorded the legislative body, and it must be remembered that the question before the court is one of the validity of an act of a large and intelligent body of men who are governed, as is the court, by considerations as to the extent of their constitutional

power to legislate, not under a narrow, restricted power of attorney, but under a governmental power vested in them by a constitution creating a sovereignty.

It is not intended by what has here been written to advocate the full exercise of this power of Congress, or to assert that it would be a wise policy which would lead to that result. An attempt has been made merely to define the extent of the power.

Augustine L. Humes.

52 WILLIAM STREET, NEW YORK, October 1, 1902.

DEATH OF THE DRAWER OF A CHECK.

RECENT decisions upon the effect of the death of the drawer of an unaccepted check render a new consideration of the subject timely. The discussions of this question both in the text-books and in the reviews have not been accompanied by a full citation of the authorities.[1]

Ever since the case of Lawson *v.* Lawson[2] was decided in 1718, the practice among bankers seems to have been unquestioned. A banker after he has heard of a depositor's death will not accept or pay a check of that depositor. The case of Lawson *v.* Lawson was decided in the infancy of banking in England. English banking was of a purely indigenous growth; it had no connection with the older European banks. In the latter part of the seventeenth century there grew up among commercial houses, merchants, and landowners, the practice of depositing their cash with goldsmiths, in whose hands was the business of changing and equalizing money. These deposits were drawn upon by orders upon the goldsmiths, and the orders became used as a medium of payment as early as 1677.[3] Such was the origin of our modern bank checks.

At that time the existing law rendered it certain that these orders would be treated practically as demand bills, and that the relation between the goldsmith and his depositor would be one of debtor and creditor. As early as 1598 a deposit of money to be redelivered upon request had been held to create a debt, and that the proper action for the recovery of such a deposit was not detinue or account.[4] The wisdom of this old ruling has been confirmed in the history of banking.

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[1] See 3 Va. L. J. 323 and 14 HARV. L. REV. 588.

[2] 1 P. Wms. 441.

[3] See 8 Macaulay's England 327.

[4] Britton *v.* Barnett, Owen 86 (1598). The whole report is as follows: "A man delivers money to J. S. to be redelivered to him when he should be required: which J. S. refused and therefore an action of debt was brought and the defendant demurred for that an action of debt would not lie but an account.

"Walmesley: An action of debt will very well lie. And he took a difference between goods and money; for if a horse be delivered to be redelivered, there the property is not altered, and therefore a Detinue lies, for they are goods known: but if money be delivered, it can not be known and the property is altered and therefore a debt will lie.

"Owen and Glanville agreed to this."

It is apparent that the orders upon goldsmiths would be treated by the courts as bills of exchange, and that much of the existing law as to bills would be applied to checks. It has sometimes been inaccurately said by courts and text-writers that checks differ from bills of exchange in that they need no presentment for acceptance and are not entitled to days of grace. But this is an error. Demand bills, of which checks are a species, were never entitled to days of grace and never required presentment for acceptance.[1]

But firmly as it has been settled that the relation between a banker and his depositor is that of debtor and creditor, and that a depositor draws demand bills upon his debtor, the minds of laymen generally have never fully comprehended the situation. In common speech we hear it continually said that a man has money at his banker's. Courts sometimes use this language, and ready money or cash in hand bequeathed by a will has been held to include a general deposit with a banker.[2]

One of the curious manifestations of this idea is shown by those decisions which call a check an assignment *pro tanto* of the deposit. Four states[3] in the Union hold this theory, and certain text-writers have supported it. But everywhere else a check is like a bill of exchange drawn generally (and if it be not so drawn it is not a bill); it is not an assignment of any fund in whole or in part.[4]

The assignment theory of a check has produced the only uncertainty which has ever existed as to what is the effect of the death of the drawer of an unaccepted but delivered check,[5] wher-

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[1] 2 Ames, Cases on Bills 265, *n.* 4; id. 133, 134, *n.* 1 and 2; Philpott *v.* Bryan, 3 C. & P. 244. In the early cases checks are treated as bills. In Ward *v.* Evans, 2 Salk. 442 (1702), the reporter speaks of an order on a goldsmith as a "note," and a few lines later calls it a "bill." In Thorold *v.* Smith, 11 Mod. 71, 87 (1706), four years later, Lord Holt calls an order upon a banker "a note" and "a bill." There is no indication in the reports whether these orders mentioned were accepted or unaccepted. The only differences that now exist between demand bills and checks is that a demand bill is expected to be put into circulation, while a check is not; and if a demand bill is not presented for payment within a time which the law deems reasonable, the drawer is released, while in the case of a check the drawer is released only to the extent of his injury.

[2] Fryer *v.* Rankin, 11 Sim. 55; Stern *v.* Richardson, 37 L. J. Ch. 369; Varsey *v.* Reynolds, 5 Russ. 12; Langdale *v.* Whitfield, 27 L. J. Ch. 795.

[3] Illinois, Kentucky, South Carolina, Nebraska.

[4] Mandeville *v.* Welch, 5 Wheat. 286; National Bank of Republic *v.* Millard, 10 Wall. 152; First National Bank *v.* Whitman, 94 U. S. 343; Florence Mining Co. *v.* Brown, 124 U. S. 385; Shand *v.* DuBuisson, L. R. 18 Eq. 283; Hopkinson *v.* Forster, L. R. 19 Eq. 74.

[5] In 14 HARV. L. REV. 588, it is contended that a check is an order, not an authority, and hence ought not to be revoked by the drawer's death.

ever the subject is not regulated by statute.[1] A check undelivered before the drawer's death can confer no rights upon any one.[2]

The authorities strictly in point upon the general question are not numerous, but there is an abundance of *dicta*. The text-writers, with one exception, have laid down the rule that the death of the drawer of such a check revokes the authority given by the check to the banker; but text-writers do not establish the law. We must look to the decisions.

The effect of the death of the drawer must be considered, 1st, as between the drawer's estate and the payee or holder; 2d, as between the bank and the holder; 3d, as between the bank and the drawer's estate.

I. As between the drawer's estate and the payee of a check dishonored because of the drawer's death, the general rule as to bills of exchange governs. If the payee has given a consideration, the estate is liable;[3] if he is a volunteer, the estate is not liable.[4] A *bona fide* transferee can, of course, recover on the check against the drawer's personal representative, while as to a holder not *bona fide*, the defenses between drawer and payee are open.

II. As between the holder and the bank, it is apparent that if the bank refuses to pay the check, the holder must have recourse upon the drawer's estate, since, even when no question of the drawer's death arises, the rule of law is absolute that the holder of an unaccepted check has no remedy against the banker, just as the holder of a bill of exchange has no remedy against the drawee until the drawee has accepted the bill. It is immaterial under this rule whether the holder be the payee or a *bona fide* transferee.

There are, however, four states, mentioned above, which have held the assignment theory of a check, and in which the bank in the ordinary case can be compelled to pay the check. The Supreme Court of one of those States, however, receding from its assignment theory, has lately held that the banker with notice of the death not only is not compelled to pay the check, but if he

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[1] Massachusetts has a statute. England has a statute declaratory of the common law. The Negotiable Instruments Law seems to be silent on the matter.

[2] Drum *v.* Benton, 13 App. Cas. D. C. 245.

[3] Whitehead *v.* Whitehead, 90 Me. 468, can be supported upon this ground. It cannot be supported on the grounds stated by the court. Rolls *v.* Pearce, L. R. 5 Ch. D. 730, can be supported on this ground, but not on the ground stated by the Vice-Chancellor.

[4] All the English cases cited *post* establish this proposition, except Bromley *v.* Brinton, L. R. 6 Eq. 275, which will be noticed *post*.

does pay, he must refund the amount paid to the drawer's estate.[1] It is doubtful what the Supreme Court of Illinois, Nebraska, and South Carolina will hold.[2] An intermediate court in Missouri[3] decided, on the assignment theory of a check, that the unaccepted check was not revoked by the drawer's death, even though the bank had notice of the death. But that case is no longer an authority.[4]

Although the bank may refuse to pay the unaccepted check on account of the drawer's death, except possibly in the states mentioned above, yet it may happen that the bank has accepted the check with notice. If it does so, it would seem that it would be held, since it could not rescind its acceptance on any ground except that of a mistake of law. Acceptance granted to the holder is payment and releases the drawer. The bank, however, which pays the check, ought in justice to be subrogated to the claim of the payee against the drawer's estate.

III. Coming to the rule that applies as between the banker and the drawer's estate, it will be necessary to review the decisions and the *dicta* which have a bearing on the question.

The original *dictum* is in Lawson *v.* Lawson.[5] In that case it was held by Sir Joseph Jekyll, as between the executor and the donee of a check, that a bill upon a goldsmith given by a man upon his deathbed to his wife for the purpose of buying mourning would operate as an appointment.[6] During the course of the argument Sir Joseph Jekyll remarked that the testator's order on the goldsmith was but an authority, and that it was de-

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[1] Weiand's Adm'r *v.* State National Bank, 65 S. W. Rep. 617 (Ky.).

[2] In Illinois it was held, in Union National Bank *v.* Oceana National Bank, 80 Ill. 212, that as to a *bona fide* holder the check could not be countermanded, but the bank must pay. Evidence of a "defense between drawer and drawee was rejected." The court here means payee. (In Bank of Antigo *v.* Union Trust Co., 149 Ill. 343, the court uses the word "drawee" for "payee.") In Niblack *v.* Park National Bank, 169 Ill. 517, the court held that a payee who took a check for a debt was a *bona fide* holder. In Gage Hotel Co. *v.* Union National Bank, 171 Ill. 531, it was held that as against an actual *bona fide* holder, as the law defines the term, a check could not be revoked, and thus in Illinois a banker must ascertain this fact at his peril. For the curious conflict in Illinois cases on checks, see Zane on Banks 228, *n.* 26, 229, *n.* 2, 233, *n.* 22, 250, *n.* 30, 586, *n.* 13.

[3] Lewis *v.* International Bank, 13 Mo. App. 202.

[4] See Dickinson *v.* Coates, 79 Mo. 250; Coates *v.* Doran, 83 Mo. 337, which reject the assignment theory of checks.

[5] 1 P. Wms. 441. The case is not authority. See Ward *v.* Turner, 2 Ves. sr. 431.

[6] In the ecclesiastical courts such checks have been held to be codicillary. Bartholomew *v.* Henley, 3 Phillimore 317; Gladstone *v.* Tempest, 2 Curteis 650; Jones *v.* Nickolay, 3 Rob. Ecc. 288.

termined by the testator's death. This theory of a check has been adhered to by the courts. The report of the case is exceedingly unsatisfactory, but Lord Loughborough, in Tate *v.* Hilbert,[1] says that the report of Lawson *v.* Lawson is certainly inaccurate, that the bill was payable ten days after sight,[2] and stated upon its face that it was for mourning. What Sir Joseph Jekyll actually did was, in a chancery court, to admit the check to probate as part of the will, although as to that matter the ecclesiastical court had exclusive jurisdiction.[3]

In Tate *v.* Hilbert[4] a testator had made a gift to Tate of a check made payable to "self or bearer" which was unaccepted at the date of the drawer's death. The bank refused payment on account of the death, and a bill in equity was brought by Tate against the drawer's executor. Lord Loughborough seems to approve of Sir Joseph Jekyll's statement as to the determination of the authority of the check, and refused to hold the check to be an appointment.

In Hewitt *v.* Kaye,[5] which was another case of a gift, Lord Romilly said: "But a cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at the banker's or anywhere else. It is an order to deliver the money, and if the order is not acted on in the lifetime of the person who gives it, it is worth nothing." This statement was hardly necessary to the decision, for the facts of the case show an ordinary bank check unaccepted at the death of the drawer, and a suit in equity brought against the executor by the payee of the check. The check being without consideration and the suit being between the payee and the drawer's representative, it was governed by the ordinary rule; but it was claimed that the check had actually transferred the equitable title to a part of the bank deposit.

In Bromley *v.* Brunton,[6] Sir John Stuart, V. C., held, on a similar state of facts, except that the check had been presented but payment refused on account of a doubt as to the signature, that the

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[1] 2 Ves. jr. 111.

[2] This bill was therefore not a check at all, but a bill of exchange, for it was a true post-dated check, *i. e.* a check made on its face payable after its date. See Zane on Banks, 349, *n.* 8. There is another use of the words "post-dated check," where the term means a check dated after its delivery. Such a check is not payable until its date, but is not a bill of exchange. See Zane on Banks 260, 261.

[3] Welsh *v.* Gladstone, 1 Phillips C. C. 293.

[4] 2 Ves. jr. 111.

[5] L. R. 6 Eq. 198.

[6] L. R. 6 Eq. 275.

check having been presented when there were sufficient funds, the deposit in the hands of the executor was liable to the payment of the check, and that the effect of the check was to appropriate so much of the "donor's money" as it called for. Again we see appearing the common idea that a depositor has money at his banker's. This case is, of course, not authority.[1]

In the case of Beak *v.* Beak,[2] it was held that no title, legal or equitable, passed to any part of the deposit, where the check was not presented in the donor's lifetime, although the delivery of the check was accompanied by the delivery of the passbook.

The case of *In re* Mead [3] contained the same ruling as the case last cited, the differentiating circumstances being that the donor of the check in his lifetime had given to the bank a notice of withdrawal of the amount stated in the check.

Bouts *v.* Ellis [4] held that, where the donor's check was exchanged for the check of a third party who cashed the donor's check in the lifetime of the donor, although the check taken in exchange by the donee was not cashed until after the death of the donor, title had passed to the money obtained by the donee.

In Burke *v.* Bishop,[5] in an opinion holding that the check of a third party was a good *donatio causa mortis*, there is a *dictum* to this effect:

> "If it had been a check drawn by Hampton Elliott [the donor], and he had died before the check was presented, and the check was a donation, the check would have been worthless, because of the demise of the donor his mandate to his agent, the bank, was revoked."

In all the foregoing cases the recovery was sought against the estate of the drawer. The check in each instance was a gift. The reason given for the decision is that the check as an authority to the banker is withdrawn or destroyed by the drawer's death before acceptance of the check, and hence that no delivery of the money had actually taken place. It has been claimed, however, that the reason given goes far beyond the necessities of the case, for each decision could have been placed on the ground that as between the drawer and the drawee, the lack of a valuable consideration alone was fatal to the passing to the holder of any title, either legal or equitable, in the account with the banker. It may be said that the

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[1] See 6 HARV. L. REV. 40.
[2] L. R. 13 Eq. 489, usually cited as *In re* Beak.
[3] L. R. 15 Ch. D. 651.
[4] 17 Beav. 121; 4 DeG. M. & G. 249.
[5] 27 La. Ann. 465.

law is that any negotiable instrument of the donor himself,[1] payable to the donee, cannot be the subject of a gift *causa mortis*. So it has been held with regard to a promissory note [2] and a draft.[3] If this be so, it may be said that the foregoing cases do not go to the extent of showing that by the death of the drawer before acceptance the check is revoked.

We may say, on the other hand, that if the check was not revoked by the drawer's death, it remained operative as a mandate to the banker, and that, therefore, a delivery by the donor had been made by the doing of everything that could be done to make the gift complete. If this be so, it would seem that the cases really turn upon the fact as to whether a revocation by death took place.

We come now to the cases wherein a recovery upon a check unaccepted before the drawer's death was sought against the bank. Each one of these cases could have been put upon the sole ground that the holder of an unaccepted check has no right of action against the bank. They are noticed here on account of their bearing upon the duty of a banker to refuse payment of an unaccepted check after notice of the drawer's death.

In Tate *v.* Hilbert[4] it was conceded by the counsel who represented the payee of the check that no recovery could be had against the bank, and so far as the English reports show, no such recovery has ever been attempted.

In Second National Bank *v.* Williams[5] the court held that a check delivered by the intestate while *in extremis* to a certain person to defray the funeral expenses of the intestate, was de-

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[1] It is settled that the check or note or other negotiable instrument of a person other than the donor is the subject of gift *causa mortis*. *In re* Mead, L. R. 15 Ch. D. 651; Clement *v.* Cheeseman, L. R. 25 Ch. D. 631; Witt *v.* Amis, 1 B. & S. 109; Amis *v.* Witt, 33 Beav. 619; Hewitt *v.* Kaye, L. R. 6 Eq. 198; Burke *v.* Bishop, 27 La. Ann. 465. The case of Miller *v.* Miller, 3 P. Wms. 356, is *contra* if the note in that case was signed by the donor himself, which seems to be very doubtful. But *quære*, if the note were the joint and several note of the donor and another?

[2] Parish *v.* Stone, 14 Pick. 198; Raymond *v.* Sellick, 10 Conn. 480, but Wright *v.* Wright, 1 Cow. 598, is *contra*. But that case is overruled in Harris *v.* Clark, 3 Comst. 93, and is disapproved in the two cases *ante* in this note. Rolls *v.* Pearce, L. R. 5 Ch. D. 730, is also *contra*. In this case the check had been negotiated to a *bona fide* holder. In Harris *v.* Clark, 3 Comst. 93, the draft had been endorsed, but probably not to a *bona fide* holder.

[3] Harris *v.* Clark, 3 Comst. 93.

[4] 2 Ves. jr. 111.

[5] 13 Mich. 282. This case is directly contrary to the old case of Lawson *v.* Lawson, 1 P. Wms. 441.

stroyed by the death of the drawer before acceptance. The reason given for the decision is that the unaccepted check was revoked by the testator's death.

The case of Fordred *v.* Seamen's Savings Bank[1] was not a case of *donatio causa mortis*, but of a check given without consideration from the payee. The check was held to have been revoked by the donor's death before acceptance.

In Simmons *v.* Cincinnati Savings Society[2] a check of the donor was claimed to be a *donatio causa mortis*, but was held to have been revoked by the donor's death.

In each of the three foregoing cases emphasis was laid upon the fact that the checks given were wholly without consideration and that the payees had no "interest."

In Saylor *v.* Bushong[3] it is said by way of *dictum:* "A check may be revoked before presentment by the drawer's death." It is apparent that the court means not presentment alone, but presentment with acceptance or payment.

In National Commercial Bank *v.* Miller[4] the court, in stating the reasons why an ordinary check does not act as an assignment, legal or equitable, of the deposit, or of any part of it, says that the recourse of the holder is against the drawer and the indorser, if any; that the drawer may revoke the check and countermand its payment before acceptance, and that if the check is unaccepted his death operates as a revocation.

In Brennan *v.* Merchants' National Bank[5] there is a *dictum* to the effect that a check unaccepted is revoked by the drawer's death. Drum *v.* Benton[6] contains a *dictum* to the effect that the death of the drawer acts as a revocation of the authority of the bank or banker to pay, but expresses some doubt of this rule on the later authorities. The court does not indicate where it finds such later authorities.

Pullen *v.* Placer County Bank[7] was a decision by the California Supreme Court in banc overruling a decision of the Department.[8] It holds that a check drawn and delivered by the drawer as a gift with a request that the check be not presented until after the drawer's death was revoked by the drawer's death before accept-

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[1] 10 Abb. Pr. N. S. 425 (Court of Appeals).
[2] 31 Oh. St. 457.
[3] 100 Pa. St. 23.
[4] 77 Ala. 168.
[5] 62 Mich. 343.
[6] 13 App. Cas. D. C. 245.
[7] 71 Pac. Rep. 83.
[8] Pullen *v.* Placer County Bank, 66 Pac. Rep. 740.

ance or payment. The decision was placed upon the ground that the check was not an assignment, but was a mere revocable authority to the banker.

It will be seen that no case is yet presented where a check was given upon a consideration, but in Wieand's Adm'r *v.* State National Bank[1] such a case appears. W. drew a check on August 15, 1900, but dated the check August 20, 1900. The drawer died on August 19, 1900. The check was given to the payee for a debt owing to the payee. The check was presented on August 21, 1900, and payment was refused, because, as was the fact, the deposit of the drawer was not equal to the amount of the check, but later the bank with notice of the drawer's death paid the deposit to the holder of the check.

The check being dated August 20th did not become payable until that day, and the bank had no authority to pay until that day.[2] But before the check became even an authority to pay the drawer was dead. The decision might have been put upon that ground, but the point was not noticed. Again, the deposit not being equal to the check, the bank could legally refuse payment of any part of the check,[3] yet if it so pleased it could have paid the deposit on the check,[4] if the check had not been revoked by the drawer's death before it became operative as a check or before it had been accepted.

The court held that the check being a mere authority was revoked by the drawer's death, and gave the administrator of the drawer judgment for the amount of the deposit.

The foregoing cases are all cases where the payee of the check was the party seeking to recover from the bank. There is no case where the check had been negotiated to a *bona fide* holder, but in Rolls *v.* Pearce[5] a recovery was permitted in favor of a *bona fide* transferee, as against the executors of the drawer. But the latter decision cannot be considered an authority upon checks,

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[1] 65 S. W. Rep. 617. It is singular that a state which holds the assignment theory of a check should be the first to decide the point ruled.

[2] Gordon *v.* Commonwealth Bank, 6 Duer 76; Crawford *v.* West Side Bank, 100 N. Y. 50. Compare Taylor *v.* Sip., 30 N. J. Law 284. This was not a true post-dated check. See *n.* 2, p. 108, *ante.*

[3] In Matter of Brown, 2 Story 519; Dana *v.* Third National Bank, 95 Mass. 445; Coates *v.* Preston, 105 Ill. 470; Lowenstein *v.* Bressler, 109 Ala. 326; Eichelberger *v.* Finley, 7 Har. & J. 381; *contra*, Bromley *v.* Commercial National Bank, 9 Phila. 522.

[4] Dana *v.* Third National Bank, 95 Mass. 445.

[5] L. R. 5 Ch. D. 730.

for the Vice-Chancellor showed that he had no comprehension of former controlling decisions.[1]

There is a decision of an intermediate court in Missouri[2] which holds that the drawer's death does not revoke the check, but that case is no longer an authority.

It is apparent that the understanding among bankers and lawyers is, except possibly in three jurisdictions,[3] that an unaccepted check is revoked by the drawer's death. It will appear, in replying to the objections which have been made to this theory, that this conclusion of the courts results from a perfectly valid rule of law.

The objections which have been made to this theory will now be noticed.

The first objection is that the check is not an authority at all, but an order upon the banker to pay money, and that the banker cannot be considered the agent of the drawer. If the check be an order, it is said that the banker cannot be considered the depositor's agent. But the theory of the rule is not one of agency. The check is called a mandate to the banker. But upon analysis it amounts to an offer on the depositor's part to the banker that if the check is paid by the banker, the amount of it may be subtracted from the depositor's account. This offer to become effective as a contract must be accepted by the banker during the depositor's lifetime. While no court has indicated that the above is the basis of the rule, it seems reasonably plain that there can be no other basis.

The second objection to holding an unaccepted check revoked by the death of the drawer, is the claim that the check is a power or authority coupled with an interest, and therefore not revoked. This theory was suggested by Mr. Vernon in the argument of Lawson *v.* Lawson[4] almost two hundred years ago. It was dismissed in that case by Sir Joseph Jekyll as unworthy of discussion. It reappeared in the hands of a text-writer not many years ago as a new theory.[5] It is not, however, enough to say that the check should be considered as an agreement to pay out of a particular debt or fund either then owing or to become owing, for even in

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[1] See 6 HARV. L. REV. 40, where this point is elaborated.

[2] See Lewis *v.* International Bank, 13 Mo. App. 202, where it is noticed above.

[3] Illinois, South Carolina, Nebraska, but as appears heretofore Kentucky has receded from its assignment theory on this question.

[4] 1 P. Wms. 441.

[5] See Daniel in 3 Va. Law Jour. 323; 2 Daniel, Neg. Inst. § 1617 b.

that case it is not an assignment.[1] The basis of this theory of a check must be either that the check is a partial assignment of the depositor's chose in action against the banker, or that it is a partial assignment of a fund. The theory is untenable because it assumes that the giving of the check confers upon the payee an interest in the fund or that it confers upon the payee a part of the chose in action. In either case the check being an assignment ceases to be negotiable. For it is one of the fundamental rules of the law of negotiable paper, that the bill or note must be payable generally, and not out of a particular fund. This is, no doubt, the reason why the assignment theory of a check is almost universally rejected by the courts. Outside of the assignment theory there is no ground for calling the check an authority coupled with an interest. For even if it be conceded that the check confers an agency on the payee, the objections to which assumption are apparent,[2] the agency that amounts to an authority with an interest is one that is united with an interest in the subject upon which the power is to be exercised. It is not enough that an interest exists in what is produced by the power.[3] But aside from that, it being conceded that the check is not an assignment and that thereby the payee acquires no interest, it follows that the check cannot be considered as an agency or authority coupled with an interest.

Next it is said that while it may be conceded that a check given without consideration is revoked by the drawer's death before its acceptance, nevertheless if the check was given for a debt or obligation owing from the drawer to the payee it ought not to be considered as revoked. There is in the authorities much by way of *dictum* that may be claimed in support of this contention.

Although counsel for plaintiff in Tate *v.* Hilbert[4] conceded that if the check had been given for a debt it would have conferred no right against the bank, yet in Second National Bank *v.* Williams[5] much stress is laid upon the fact that the payee had no interest.

In Fordred *v.* Seamen's Savings Bank[6] Rapallo, J., observes: "Viewing the draft as a mere direction or power, the plaintiff not

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[1] Christmas *v.* Russell, 14 Wall. 69.

[2] See 14 HARV. L. REV. 591. Rapallo, J., in Fordred *v.* Seamen's Savings Bank, 10 Abb. Pr. N. S. 425, says: "The plaintiff [the payee] was merely his [the drawer's] agent." But the opinion does not show the sense in which these words are used.

[3] Hunt *v.* Rousmanier, 8 Wheat. 174; Langdon *v.* Langdon, 4 Gray 186.

[4] 2 Ves. jr. 111.

[5] 13 Mich. 282.

[6] 10 Abb. Pr. N. S. 425 (Court of Appeals).

having proved any interest, it was revocable, and was revoked by the death of the drawer." The word "interest" seems to be used in place of the word "consideration."

It is apparent that under other New York decisions the check could confer no interest on the payee.

In Simmons *v.* Cincinnati Savings Bank[1] it is said: "The check in the present instance was a mere order or authority to the payee to draw the money; and it being without consideration, it was subject to be countermanded or revoked, while it remained unacted on in the hands of the payee."

The case of Weiand's Adm'r *v.* State National Bank,[2] however, holds that a check given in payment of a debt was revoked by the death of the drawer before acceptance.

The sufficient answer to this objection is that it imposes upon the banker the duty of determining at his peril whether the drawer gave the check with or without consideration. This fact the banker cannot know, yet he must decide it at his peril. Such a duty imposed upon the banker contradicts the received theory of the banker's contract with the drawer, which is to pay his checks upon demand. No court ever will or can accept such a theory as this, if it has the least comprehension of the business of banking.[3]

Again it is said that in the hands of a *bona fide* holder, an unaccepted check ought not to be considered as revoked by the death of the drawer. There is some authority for this position. In Tate *v.* Hilbert[4] Lord Loughborough said that if the payee had paid the check away either for a valuable consideration or in discharging a debt of her own, it would have been good. But he probably meant that it would have been good against the drawer's estate, which no one would dispute.

In Rolls *v.* Pearce,[5] Malins, V. C., held that the checks having been paid away by the payee were good. It is doubtful whether he intended to go further than to hold them good as against the drawer's estate, but certainly in the light of other English decisions, he could not have intended to intimate that the holder could

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[1] 31 Oh. St. 457.

[2] 65 S. W. Rep. 617 (Ky.).

[3] In Illinois it has been held that the bank as against a payee who has received a check for the amount of his debt, cannot apply the deposit to a demand note of the drawer which the bank held. Niblack *v.* Park National Bank, 169 Ill. 517. The opinion calls the payee of a check a *bona fide* holder for value.

[4] 2 Ves. jr. 111.

[5] L. R. 5 Ch. D. 730.

recover against the bank. In Illinois, indeed, it has been held that as against a *bona fide* holder of a check, the check cannot be revoked.[1] But this is held upon the wholly untenable doctrine that the check is an assignment.

The objection to this theory is that the banker simply contracts to pay the drawer's checks upon genuine indorsements. He does not contract to go further and to determine at his peril whether or not the indorsee or holder is a *bona fide* holder. Such a requirement would entirely revolutionize the accepted theory of a banker's duty.

Finally, it is said that the mandate of a bill of exchange is not revoked by the drawer's death and that a check should be treated in the same way. But there is no authority for so saying. The usual authorities cited do not establish the proposition as to bills of exchange. The case of Billings *v.* DeVaux[2] merely holds that as against the acceptor, who accepts in ignorance of the death of the drawer, the acceptance is good. This would be the rule as against a bank which accepted a check in ignorance of the death of the drawer, the authorities, as will later appear, saying that a check so accepted and paid may be charged against the drawer's estate. In the case of Hammonds *v.* Barclay[3] the acceptances were made in the lifetime of the drawer. In Cutts *v.* Perkins[4] the draft was held to be an assignment; hence it could not be a bill of exchange, the essence of which is that it must be drawn generally, and is not an assignment. The words of Lord Romilly in Hewitt *v.* Kaye,[5] to the effect that an order for the payment of money, whether the money be at a banker's or anywhere else, is worth nothing if not acted on in the lifetime of the person who gives it, would seem to include bills of exchange. The text-books do not state the rule to be at all settled.

But even though there be no authority for saying that the bill of exchange as a mandate[6] to the drawee is not revoked by the death of the drawer, and even if we assume that such mandate is not revoked by the death of the drawer before acceptance, there

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[1] Gage Hotel Co. *v.* Union National Bank, 171 Ill. 531.

[2] 3 M. & G. 565.

[3] 2 East 227.

[4] 12 Mass. 206. The so-called bill of exchange in Debesse *v.* Napier, 1 McCord 106, was held to be an assignment for a valuable consideration.

[5] L. R. 6 Eq. 198.

[6] Charles O'Conor, counsel in Harris *v.* Clark, 3 Comst. 93, said: "A draft is not an assignment *per se*, but only a mandate."

are reasons why a bill of exchange should receive a different treatment from that accorded to a check. A bill of exchange is expected to be put into circulation; a check is not. The acceptance of a bill of exchange is not governed by any such customary contract as that which exists between the depositor and his bank. Bills of exchange are usually drawn at a distance from the home of the drawee, and the application of the rule to bills of exchange would cause practical difficulties which would not be met in the case of checks. So that the deduction sought to be made from bills of exchange fails, when the matter is considered in the light both of authority and of actual differences.

There remains to be considered the situation of the bank if it accepts or pays a check after the drawer is dead. If it accepts or pays the check in ignorance of the death of the drawer, the check may be charged against the account. The ground for this rule is apparently a *dictum* of Lord Loughborough. He said in Tate *v.* Hilbert:[1] "If she [the payee] had received it immediately after the death of the testator before the banker was apprised of the death, no court, I am inclined to think, would have taken it away from her."

This has been construed by all the text-writers to mean that the bank would have been protected if it paid the check in ignorance of the drawer's death. In Brennan *v.* Merchants' National Bank[2] there is a *dictum* to this effect. And there are other *dicta* which affirm the rule.[3]

But it is said that if the bank can pay the check if it be ignorant of the death of the drawer, the rule is illogical if the death revokes the authority given by the check. The answer to that suggestion is that the rule of the common law is not undeviating, and the application of the more intelligent principle of the civil law is warranted in this instance by considerations of business policy, which after all have made the law applicable to all kinds of commercial paper. It is warranted also by the analogies of the law applicable to bankers.[4]

If, however, a banker with knowledge of the drawer's death

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[1] 2 Ves. jr. 111.

[2] 62 Mich. 343.

[3] Drum *v.* Benton, 13 App. Cas. D. C. 245.

[4] It is held that a banker who has no notice of his depositor's death is entitled, when the depositor's bill, which the banker has discounted, becomes due, to charge the bill against the depositor's account. Rogerson *v.* Ladbroke, 1 Bing. 93.

pays the check, the latest authorities are to the effect that the check cannot be charged against the deposit. It is so held in Pullen *v.* Placer County Bank,[1] where the check was delivered as a gift, and in Wieand's Adm'r *v.* State National Bank,[2] where the check was given to pay an existing debt.

It remains to be added that if a check is accepted in the lifetime of the drawer, his death before payment is immaterial.[3] If the acceptance is granted to the drawer of the check before delivery, while the drawer is not released, the bank upon acceptance appropriates so much of the drawer's account as the check calls for. If the acceptance is made to the payee or other holder of the check, the drawer is released and the check becomes the promissory note of the bank, which the holder, with the opportunity of having the check paid, voluntarily received instead of the cash.

There is nothing inequitable in the rule that the death of the drawer revokes an unaccepted check. The check is payment only if it be paid. If the dishonored check is in the hands of the payee who received the check upon a consideration, the payee can recover his claim from the estate if it is solvent. If the check was given without consideration, the law can give the payee no relief. If the check is in the hands of a *bona fide* transferee, he has recourse upon his indorser as well as upon the drawer's estate if the check is dishonored. But there is no reason why, in case the drawer died insolvent, a creditor should obtain a preference merely because he happens to have a check and the insolvent debtor left a balance at his banker's. All the creditors should be placed upon an equality, for "equality is equity."

John Maxcy Zane.

CHICAGO, ILLINOIS.

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[1] 71 Pac. Rep. 83.

[2] 65 S. W. Rep. 617.

[3] An accepted check cannot be countermanded. See 2 Ames, Cases on Bills 801.

HARVARD LAW REVIEW.

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THE LAW SCHOOL. — The registration in the School on November 15 for the last twelve years is shown in the following table: —

	1892–93.	1893–94.	1894–95.	1895–96.	1896–97.	1897–98.
Res. Grad.	—	—	—	—	—	1
Third year	69	66	82	96	93	130
Second year	119	122	135	138	179	157
First year	135	140	172	224	169	216
Specials	71	23	13	9	31	41
Total	394	351	402	467	472	545

	1898–99.	1899–1900.	1900–01.	1901–02.	1902–03.	1903–04.
Res. Grad.	1	—	1	1	—	4
Third year	102	134	144	149	167	180
Second year	169	193	202	190	196	201
First year	218	232	241	229	228	293
Specials	58	51	58	59	49	60
Total	548	610	646	628	640	738

The total registration is much larger than ever before in the history of the School. There is an increase in all classes over last year, and in all but the second year class there is a larger enrollment than in any previous year.

The following tables show the sources from which the twelve successive classes have been drawn, both as to previous college training and as to geographical districts: —

HARVARD GRADUATES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1895	32	4	13	49
1896	23	7	17	47
1897	27	2	15	44
1898	42	1	25	68
1899	45	6	19	70
1900	50	11	30	91
1901	45	3	28	76
1902	59	2	28	89
1903	43	4	28	75
1904	47	5	17	69
1905	44	4	20	68
1906	52	7	32	91

GRADUATES OF OTHER COLLEGES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1895	8	14	30	52
1896	14	11	45	70
1897	9	12	56	77
1898	19	23	62	104
1899	21	12	45	78
1900	30	19	60	109
1901	27	22	59	108
1902	22	29	61	112
1903	23	26	83	132
1904	25	29	74	128
1905	23	27	78	128
1906	30	45	92	167

HOLDING NO DEGREE.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	TOTAL OF CLASS.
1895	16	3	14	33	135
1896	10	4	9	23	140
1897	26	7	16	49	170
1898	25	2	25	52	224
1899	11	2	8	21	169
1900	11	2	3	16	216
1901	25	—	9	34	218
1902	18	4	9	31	232
1903	21	1	12	34	241
1904	22	—	10	32	229
1905	12	2	18	32	228
1906	25	1	9	35	293

As the thirty-five Harvard seniors in the first year class have in each instance completed the work required for the Harvard A. B. degree, all members of the class are virtually college graduates. The same is true of practically the entire School, since seven special students are the only members who have not received a degree. Of the sixty special students, thirty-three have entered this year, and of these twenty-six are graduates of a college or university, six having received a degree in law.

One hundred and eleven colleges and universities have representatives now in the School as compared with ninety-four last year and ninety-two the previous year. In the first year class sixty-three colleges and universities, as compared with fifty-six last year, are represented, as follows: Harvard, 97;

Yale, 30; Brown, 16; Bowdoin, 11; Dartmouth, 11; Princeton, 8; Williams, 7; Amherst, 6; Colby, University of Iowa, Tufts, 4; University of California, Leland Stanford, Wesleyan, 3; Bates, Cornell University, Georgetown, Iowa College, Mt. Allison, Nebraska, College City of New York, Tulane, Wisconsin, 2; Bucknell, Cambridge, Charles City, Coe, Colorado College, Cornell College, Dalhousie, De Pauw, Denison, Fargo, Franklin and Marshall, Georgia, Hamilton, Holy Cross, Illinois College, State College of Kentucky, Knox, McGill, Maine, Manhattan, Minnesota, New Brunswick, Northwestern, Notre Dame, Oberlin, Ohio University, Ohio Wesleyan, Oxford, Pennsylvania, Pacific, Rose Polytechnic, Rutgers, St. Josephs, Toronto, Trinity, U. S. Naval Academy, Western Maryland, Western Reserve, Westminster, Wheaton, 1. There are at present in the School eight law school graduates, of whom three have received also an academic degree, representing the following law schools: Detroit, Dickinson, Kansas City, Kings (Windsor), New York, New York University, Notre Dame, Ohio State University.

"The Peonage Cases." — Few recent judicial statements have aroused greater interest than the response of Judge Jones of Alabama to certain questions propounded by a grand jury relative to peonage and involuntary servitude. In his reply to these questions the learned judge covered two distinct topics. With commendable regard for the dignity of the law and the welfare of the community he first recommended the indictment of a numerous class of persons who had abused the processes of the courts and fraudulently induced ignorant laborers to subject themselves to a condition approaching slavery. Not content with this, however, the court proceeded to a somewhat gratuitous discussion of the constitutionality of an interesting and important Alabama statute. *Peonage Cases*, 123 Fed. Rep. 671 (Dist. Ct., M. D. Ala.). The Alabama legislature had enacted that in certain counties of the state any laborer who makes a written contract to serve, and then abandons his employment without the consent of his employer or a good excuse to be adjudged by the court, and then makes a similar contract with a second employer without informing him of the first agreement, is guilty of an indictable offense.[1] This statute, says the judge, is invalid under both the Alabama and the Federal constitutions, as involving, first, a denial of the equal protection of the laws; second, imprisonment for debt; and third, involuntary servitude.

The first of these three objections the court does not strongly press. Its contention is based on the fact that the operation of the statute is limited to certain counties and to a certain class of contracts. But the constitution means by securing the equal protection of the laws simply that all persons in the same class shall be treated alike under like conditions.[2] Whoever therefore attacks on this ground the validity of a statute must show that the classification is arbitrary and unreasonable. This was hardly attempted by the court. The irresponsibility of the negro laborers and their propensity for breaking contracts at a season when to lose their labor may mean ruin to the planters, shows that the classification was not unreasonable.

The reasoning of the judge on the question of imprisonment for debt appears to be based on a misinterpretation of the statute. The breach of

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[1] Acts 1900–1901, p. 1208, § 1.

[2] Cooley Const. Law, 3d ed., 249. See also Barbier *v.* Connolly, 113 U. S. 27.

the first contract, it is said, creates only the relation of debtor and creditor, and because of the existence of this relation the debtor may not, without his creditor's consent, seek employment elsewhere under pain of imprisonment. This, the court insists, is virtual imprisonment for debt. A fair construction of the statute might well lead to a different conclusion. It provides not that the laborer may not work for a second employer, but that he may not through concealment of his former breach of good faith make a contract similar to the one he has broken. If the laborer is imprisoned for anything, it is not for debt, but for concealment of a fact that may conceivably amount to fraud.

The third and last objection, namely, that the statute involves involuntary servitude, is the most serious. But here, too, it seems, on careful consideration, that the legislature avoided infringement of the constitution; for, first, the Supreme Court has said that "involuntary servitude" means servitude involuntary in its inception,[3] and here the servitude at its inception is voluntary; and, second, without considering the soundness of that view and that authority, the statute provides for nothing more than courts of equity in the usual constitutional exercise of their powers often exact under pain of imprisonment. Though a court of equity will not force a man to observe a contract to labor, it will order that if he refuses to observe it he may not make a similar contract with another.[4] The statute in question does no more than extend the rule to cases where the services are not of unique value, and enforce in another form this well established equitable doctrine. The objection of unconstitutionality cannot be stronger in the one case than in the other. It is difficult, therefore, to see wherein either the letter or the spirit of the constitution has been violated.

Co-ordinate Rights in a Bank Account. — A person may sometimes desire to open an account in a bank which shall be equally available to another person and himself. This most frequently happens between a husband and his wife. The situation has often presented itself in cases of savings-banks accounts.[1] Thus, in a late Michigan case, a husband instructed the savings-bank to enter his wife's name against his account, so that she might draw as freely as he on the account. The wife having ordered it transferred to her individual account while her husband was on his death-bed, the court held that his subsequent death revoked her authority to use the fund. *Burns* v. *Burns*, 93 N. W. Rep. 1077. But, admitting that her power was revocable by the husband's death, still, since she had exercised it for her own benefit before his death, it would seem that the transfer of the account made it her absolute property.

The question of how a depositor may give another rights with reference to his account must depend primarily upon the nature of the relation existing between him and the bank. What the relation is between a savings bank and its depositors is in dispute, some authorities holding that it is a trust relation,[2] others that it is an agency relation,[3] still others that it is a

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[3] See Robertson *v.* Baldwin, 165 U. S. 275, 281.
[4] Duff *v.* Russell, 133 N. Y. 678, affg. 39 N. Y. State Rep. 266.

[1] See a collection of cases in 31 L. R. A. 454 n.
[2] Berry *v.* Windham, 59 N. H. 288. [3] Osborn *v.* Byrne, 43 Conn. 155.

debtor and creditor relation.[4] On the first two theories, the question is comparatively simple; it is on the last that its discussion is most important. This is especially true in view of its application to the ordinary bank where a debtor and creditor relation admittedly exists.[5] It is conceived that there are two feasible ways, depending upon the purpose of the depositor, of effecting that object. First, it may be intended merely to give the wife a power of attorney to draw on the account for her own use as she may desire. If this power were unsupported by consideration, a mere gratuity, it would be revocable either by the donor's order or by his death.[6] But, if desired, it could be made irrevocable by securing consideration for it,[7] when a different situation would arise. A demand by a depositor on a bank creates a separate obligation on the part of the bank to the extent of the demand.[8] Consequently, the wife in exercising her power of attorney, could by each demand upon the bank create an obligation to the extent of the demand in favor of the depositor which she could enforce for her own benefit. It follows that there would be an irrevocable partial assignment, or a series of such assignments, of the whole obligation to the wife, each of which would be completed, and their number and amount determined, by her demands. Since there is consideration, there can be no question of revocation of the power of attorney, but whether that power should be held to continue beyond the death of the assignor, is a question which must depend upon the intention of the parties. Second, it may be desired to give the wife a right co-extensive with that of the husband. It is suggested that this may be accomplished by opening a joint account in the names of the husband and the wife. To secure to each the power to draw at will for his own use, a condition of the account would be that either may have the power to use their joint names in drawing against the account or proceeding with regard to it in any way. The power in the husband would be irrevocable, because it would be a condition of the wife's taking an interest; her power would be irrevocable, because coupled with her interest.[9] Upon the death of either, the total interest would necessarily survive to the other in accordance with the doctrine of survivorship in joint rights.[10] This would probably effectuate the wishes of the parties. In those states where statutes have been passed limiting the operation of the doctrine of survivorship, the situation would be changed accordingly. If it is provided that a joint interest shall go to the decedent's representative in one way or another, then the question whether, upon the death of either, the power to draw as before would continue co-extensive between the survivor and the representative of the other, would again depend upon the intention of the parties.

JURISDICTION OVER A TRUST CREATED ABROAD. — A neat question is raised when the trustees of a trust created in another jurisdiction apply to the court of their domicile for instructions concerning the administration of the trust. By what law is the validity of the provisions of the trust to be deter-

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[4] Robinson *v.* Aird, 29 So. Rep. 633 (Fla.).
[5] Bank *v.* Brewing Co., 50 Oh. St. 151.
[6] Blackstone *v.* Buttermore, 53 Pa. 266.
[7] Guthrie *v.* Wabash Ry. Co., 40 Ill. 109.
[8] Brahm *v.* Adkins, 77 Ill. 263.
[9] Dickenson *v.* Central Nat'l Bank, 129 Mass. 279.
[10] Trammell *v.* Harrall, 4 Ark. 602.

mined? And what is to be done if the trust is one which could not have been created in the country in which the instructions are sought? An express trust created by the owner of the property must be considered as an interest in the property and treated as such. If then it is a trust of land, it must be created as any other interest in land is created, in accordance with the law of the situs.[1] And if an enforceable interest is created by the law of the situs, that interest must be recognized everywhere.[2]

Beyond this point the law is far from clear. The courts in dealing with trusts of personalty seem to avoid laying down any precise or definite rule.[3] On the general principles of our law, however, it seems necessary to admit that the law of the place where it is alleged a trust has been created must determine whether a trust has ever come into existence. That is the law which must give legal effect to the acts done.[4] The question then is, what law shall govern dealings with the trust property? It used to be said, though erroneously, that the passing of title to personal property depended on the *lex domicilii* of the owner.[5] The more sound view is that the passing of title to personalty is governed by the law of the situs of the personalty at the time.[6] In the same manner it would seem to follow that the proper law for determining the operation of a trust of personal property and the effect of dealings with it, is the law of the country in which the *corpus* of the trust is held. The domicile of the equitable owner or of the legal owner cannot affect it.

A case for the application of these principles was recently presented to the Chancery Division of the High Court. A marriage settlement was made in Scotland on the marriage there of a Scotchwoman and a domiciled Englishman. Personalty was given in trust to English trustees, with an alimentary non-alienable provision for the husband if he survived. This form of provision was good by the law of Scotland, but not by that of England. The husband survived, having previously mortgaged the provision. In a question as to the rights of the mortgagees, the court decided in their favor. *In re Fitzgerald*, [1903] 1 Ch. 933. The court put its decision on the ground that the validity must be determined by the law of England, and by that law the provision against alienation was void as against public policy. The court was not clear as to the reason for settling this question by the law of England, but talked vaguely of the law of the intention of the parties. But the intention of the parties cannot determine the law by which a transaction is to be governed. It may, however, be looked to for the purpose of interpreting the transaction.[7] Taking that rule, it would seem to be possible to sustain the decision in the case on the principles above set forth. The fact that an English settlement of other property was made at the same time and that the property was placed in the hands of the same trustees, Englishmen, may reasonably be construed to show, not that the parties intended a settlement in Scotland to be governed by English law, but that the parties intended the trust to be an English trust; that the *corpus* should be held in

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[1] Acker *v.* Priest, 92 Iowa 610.

[2] Siebberas *v.* De Geronimo, Jour. du Palais 1895, IV. 28.

[3] See Fowler's Appeal, 125 Pa. St. 388; First Nat'l Bk. *v.* Nat'l Broadway Bk., 156 N. Y. 459.

[4] See 16 HARV. L. REV. 58.

[5] Edgerly *v.* Bush, 81 N. Y. 199.

[6] Cammell *v.* Sewell, 5 H. & N. 728; Green *v.* Van Buskirk, 5 Wall. (U. S.) 307, 7 Wall (U. S.) 139.

[7] 16 HARV. L. REV. 58.

England and there administered. Clearly on that ground, the *corpus* being within the jurisdiction of the English law, that law alone could give effect to any dealings with it. It is to be regretted that the court did not take this opportunity to enunciate the principles of law governing this interesting class of cases.

Liability for Negligent Injury Resulting in Suicide. — The development of the modern law of negligence has given rise to many interesting decisions. A late Massachusetts case furnishes an example of this class. The plaintiff's testator committed suicide while suffering from insanity induced by an injury which the defendant had negligently inflicted. The disease had destroyed the power of the deceased to discriminate between right and wrong, but he was still able to know what he wished to do, and to act towards that end. The court, following Scheffer *v.* Washington, etc., R. R. Co.,[1] where the facts seem identical, held that the defendant was not liable for the testator's death, since it was caused by the testator's own act and not by the defendant's negligence. *Daniels* v. *New York, etc., R. R. Co.*, 67 N. E. Rep. 424 (Mass.).

There should be no difficulty in sustaining the plaintiff's suit on grounds of legal cause. A man is liable for the probable results of his negligence.[2] Insanity would seem sufficiently probable as a result of severe shock and bodily injury; and suicide is such a sufficiently common result of insanity like that in the present case, that it may be justly urged that where the latter is probable, the former is. Nor does the fact that the deceased's death is the immediate result of an act other than the defendant's break causal connection if it is admitted to be a probable result.[3] But if it can be shown that the deceased was himself at fault, then, although the defendant's negligence caused his death, the plaintiff cannot recover.[4] It would seem, then, that the decision of the principal case must rest upon the ground that the plaintiff was at fault when he killed himself.

It is difficult, however, to show any fault on the part of the deceased. A man is generally responsible for his acts, that is, for those things which he chooses to do. But where a man whose mind is so crippled by loss of moral judgment that he cannot distinguish between right and wrong chooses that which in his normal state he never would have chosen, it is unjust to hold him responsible, in the sense that he is at fault, merely because a normal man would have been at fault had he so chosen. This is supported by the criminal decisions, which make knowledge of right and wrong the test of fault.[5]

This reasoning may seem at variance with the rule that an insane person is liable for his torts,[6] for it might seem to follow from that rule that an insane person in doing intentional damage is always at fault. But the cases which established that rule went upon the theory that he who is damaged ought to be recompensed.[7] An insane defendant was held liable, though

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[1] 105 U. S. 249.
[2] Milwaukee, etc., R. R. Co. *v.* Kellogg, 94 U. S. 469.
[3] Lane *v.* Atlantic Works, 111 Mass. 136.
[4] Locker *v.* Damon, 17 Pick. (Mass.) 284; Nashua, etc., Co. *v.* Worcester, etc., R. R. Co., 62 N. H. 159.
[5] United States *v.* Young, 25 Fed. Rep. 710.
[6] McIntyre *v.* Sholty, 121 Ill. 660.
[7] Holmes on Com. Law, 84.

the mere instrument of damage, because there was no better person to hold. Therefore these cases furnish no inference of fault to controvert the argument of the preceding paragraph. Their theory is rather in support of the present plaintiff. Thus, if A causes B to become insane, and B, because of his insanity, damages C, then A is a better person to hold liable than B, since B is the mere instrument, while A is at fault. In the principal case the defendant is A, and the plaintiff stands in the position of both B and C, for the testator was used as an instrument to damage himself. It does not seem just to make the testator's bare instrumentality a bar to the action, and the plaintiff should therefore recover.

GRATUITOUS UNDERTAKINGS. — In personal actions the duty which is violated is generally one of two kinds. It may be one imposed upon the defendant in common with all the world, independently of any act or volition on part of the defendant, or it may be one which arises entirely from the defendant's promise, given formally or for good consideration. There is, however, in addition to these, at least one other way in which a legal duty may arise, that is, from a gratuitous undertaking by the defendant. Here it is a duty which the defendant without consideration has assumed voluntarily. It arises from some peculiar relation to the plaintiff, into which the defendant has entered.

The great bulk of these so-called "gratuitous undertakings" consists of the ordinary transactions of mandate. A mandate is defined as a consensual contract by which one party confides any transaction to another, who undertakes to perform it gratuitously.[1] A railroad, for instance, is held liable to a passenger whose contract was with a different road,[2] or who was being carried free under a misstatement as to his age,[3] or who had a pass as a stockholder.[4] This liability is imposed by law upon any one voluntarily assuming the relation of carrier to passenger. It is larger than the coexistent duty owed by the defendant to all the world, since it includes, for example, responsibility for the independent acts of servants,[5] or for hidden defects. An analogous instance of the same sort of liability is that owed to invited guests, where again the strict liability of the landlord depends upon his voluntary undertaking.

The most important class of cases dependent upon a gratuitous undertaking is probably that of gratuitous bailments. Formerly the courts attempted to construe a gratuitous bailment as a binding contract,[6] but lack of consideration makes that explanation untenable. In the case of a finder who picks up goods intending to return them to the owner, there is the additional objection of an absence of mutual assent.[7] In both these cases the bailee is liable to the bailor, and in both of them his duty arises from the relation into which he has voluntarily entered, not from a contract nor from

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[1] Williams *v.* Conger, 125 U. S. 422.
[2] Foulkes *v.* Met. District Ry. Co., 5 C. P. D. 157.
[3] Marshall *v.* Y. N. & B. Ry. Co., 11 C. B. 655.
[4] Phil. & Read. R. R. Co. *v.* Derby, 14 How. (U. S.) 468. *Cf.* Austin *v.* Great Western Ry. Co., L. R. 2 Q. B. 442.
[5] Croker *v.* Chicago, etc., Ry. Co., 36 Wis. 657; Putnam *v.* Broadway, etc., R. R. Co., 55 N. Y. 108.
[6] Riches *v.* Briggs, Yelv. 4; Hart *v.* Miles, 4 C. B. N. S. 371.
[7] Smith *v.* Nashua, etc., R. Co., 27 N. H. 86.

the mere fact of his existence. It is true the courts have laid down an arbitrary rule that a gratuitous bailee is liable only for gross negligence,[8] but by means of various subordinate rules of interpretation they have nearly reconciled this with the natural and as it seems more sound principle that the bailee should be required to exercise that degree of care which would seem reasonable from the character of the thing undertaken.[9] But whatever rule is applied to determine the extent of liability, the liability itself must arise from the act of the defendant in assuming such a relation.

The utility of the doctrine of undertakings is well illustrated by the case of *Shiells* v. *Blackburne*.[10] A customs officer who gratuitously undertook to enter some goods at the custom house, was held liable for performing it negligently. So, in a recent Canadian case the defendant, an insurance agent, agreed, without compensation, to place some additional insurance for the plaintiff, and notify the other companies of the increase. Through his neglect of this notification the plaintiff when the premises were burned was forced to settle at a loss. The court held that the defendant was liable for the loss. *Barber* v. *Jones*, 2 Can. L. Rev. 658 (September, 1903). In both these cases the duty violated arises from the relation assumed by the defendant, and his liability exists only because of his undertaking.

Insurance in Benefit Societies. — Insurance on the co-operative or assessment plan has become the chief, instead of a subsidiary purpose of the Mutual Benefit Society. The courts accordingly treat such a society as merely another form of insurance company.[1] Alike in purpose, the two differ chiefly in this, that while the contract of the insured with the ordinary company is contained in the policy alone, only part of the contract of the member with the society is in the certificate of membership. The by-laws in force at the time are part of the contract, whether mentioned in the certificate or not.[2] Practically all such by-laws contain provisions for their amendment. In a recent Kansas case the plaintiff's dues were fixed by the by-laws of a mutual benefit association. An amendment materially increasing his monthly payment without his consent was held void as to him. *Miller* v. *Tuttle*, 73 Pac. Rep. 88. The case involves the question how far the society may amend its by-laws so as to increase the burdens or lessen the benefits of a member.

To make the question depend on the "reasonableness" of the amendment, as some courts have done,[3] is unsatisfactory. The rights of the member should be determined by deciding, from a fair construction of the contract, to what he agreed. To set up an arbitrary standard of reasonableness helps but little to the solution of the question. What effect, then, has the provision for amendment of the by-laws on the contract? As to this there is apparently a hopeless conflict. Some cases[4] seem to hold that the mem-

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[8] Coggs *v.* Bernard, 2 Ld. Raym. 909.

[9] For a full discussion of this point, see 5 Harv. L. Rev. 222. Preston *v.* Prather, 137 U. S. 604; Shiells *v.* Blackburne, 1 H. Bl. 158; Gill *v.* Middleton, 105 Mass. 477; Siegrist *v.* Arnot, 10 Mo. App. 197.

[10] *Supra.*

[1] See cases collected in Niblack, Acc. Ins. & Ben. Soc. § 3, n.

[2] *Idem*, § 136, and cases cited.

[3] Weiler *v.* Eq. Aid Union, 92 Hun (N. Y.) 277.

[4] Cases collected in Morton *v.* Supreme Council, 73 S. W. 259.

ber agrees to any amendments the society may make concerning its government or the transaction of its business, but not to amendments materially lessening the value of his insurance. This view fails to recognize that the member must realize that he is entering a mutual association, and that a partial sacrifice of his individual rights may often be necessary to preserve to him the benefit of its continued existence. On this reasoning other cases[5] seem to hold that the member agrees to any amendments the society sees fit to adopt. This is error at the other extreme. Prospective benefits for which he has given valuable consideration should not be wholly at the mercy of the majority. On the whole, neglecting language broader than the decisions require, it is believed that nearly all the cases may be reconciled as establishing the following middle view: That the member agrees to changes in the original contract except in so far as they alter amounts expressly named in the certificate. This construction seems best to accord with justice and the probable intention of the parties. The ordinary man would suppose himself secure in rights to definite sums specified on the face of the certificate, while regarding the right to benefits provided by the by-laws as a right to receive them subject to such changes as the good of the society as a whole demands. And the society in contracting would hardly demand greater latitude than this in adapting its rules to changes in its financial condition.

THE NATURE OF A PARENT'S RIGHT IN HIS CHILD. — The primitive conception of the family relation made the child the property of its father. The Roman law even placed its life at his disposal on the theory that he who gave life should have the power to take it.[1] The common law was more humane. But although the child was given separate property rights, and unnecessary acts of cruelty on the part of the father were illegal,[2] yet the duty of maintenance was established only by statute,[3] and within the last century the father had in England an absolute right to the custody of the child, which was not affected by the child's interests, nor forfeited by the father's misconduct.[4] Modern ideas are in sharp contrast with this ancient conception. In deciding custody cases, the courts have repeatedly stated that the only consideration is the interest of the child.[5] Text-writers have gone still further and advanced a theory of the parental relation which makes the parent's duties — to maintain, protect, and educate — fundamental. His rights to the service and custody of the child, to correct it and determine its education and religious training, are, on the other hand, regarded as merely incidental to his obligations, bestowed because necessary to their performance.[6]

There are, however, decisions whose correctness can hardly be questioned, which cannot be accounted for under this theory. Thus courts are frequently called upon to decide whether a child shall be intrusted to a poor and ignorant parent or to more prosperous relatives. If the interests of the child were, in truth, the only consideration, and the parent's rights merely

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[5] Collected in Pain *v.* Doc. St. Jean Baptême, 172 Mass. 319.

[1] Cod. 8, 47, 10; 1 Bl. Com. 452.
[2] 1 Bl. Com. 453; Johnson *v.* State, 2 Humph. 283.
[3] 43 Eliz. c. 2.
[4] See Talfourd's act, 2 & 3 Vict. c. 54; Rex *v.* De Mandeville, 5 East, 221.
[5] People *v.* Mercein, 3 Hill (N. Y.) 399.
[6] Schouler Domestic Relations, 5th ed., 383.

incidental to his obligations, the child would often have been taken from its parent; yet this will never be done unless the parent is morally unfit to control his child.[7] Again, even after a parent has been deprived of the custody of his offspring and owes it no parental duties, the courts have repeatedly recognized his right of access to his child.[8] A recent New York case furnishes an extraordinary illustration of this tendency of the courts to recognize the independence of the parent's rights. The custody of children was taken from their aunt, a Protestant, and awarded to their grandmother, a Catholic, solely because the father was a Catholic. By the same decision the father's application for their custody was refused on the ground that his misconduct had forfeited his right to it. *Matter of Jacquet*, 40 N. Y. Misc. 575. The court clearly proceeded on the theory that a parent's rights are not merely incidental to his obligations, for, although the father was deprived of the custody of the children and relieved of his parental obligations, yet he was still conceded the right to determine their religious training.

It seems apparent that although the reaction against the barbarities of the old theory of the parental relation has led the courts to lay stress upon the rights of the child, they have in effect proceeded upon the theory that the rights of parent and child are respectively independent, springing separately from the fact of parentage. This view seems both legally sound and in harmony with the modern, civilized conception of the family relation.

Reduction of Beneficial Interest of an Assignee of a Trustee because of the Latter's Defalcation. — If a trustee, who is also a beneficiary under the trust, commits a defalcation, the other beneficiaries may satisfy the default out of the trustee's interest.[1] If, however, before committing the default, the trustee has assigned his interest, a different question arises. In England, it appears to be settled that even in that case, the other beneficiaries may take in advance of the assignee.[2] In America, it seems to have arisen for decision only once;[3] then the English rule was adopted without qualification. How the question would be treated in new jurisdictions is difficult to determine.

That a trustee should be obliged to diminish his beneficial interest in favor of the other beneficiaries to the extent of his default is undoubtedly a salutary rule. The English cases say that he must be regarded as having anticipated the payment to himself of his share.[4] This is obviously a fiction. A better explanation would seem to be that the trustee should not be allowed to set up his own default in order to diminish the shares of the other beneficiaries. It is but another of those stringent but beneficent rules that are aimed at maintaining undeviating rectitude on the part of fiduciaries. A different proposition is presented, however, when the trustee has previously assigned his interest. Obviously the case is not covered by the English reasoning, for, as the beneficial interest is no longer his, the trustee cannot be regarded as having paid it. Nor, now that the interest to be diminished belongs to an innocent third person, can the other beneficiaries contend that the trustee will only suffer the consequences of his

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[7] See Hanson *v.* Watts, 40 Ind. 170.

[8] Miner *v.* Miner, 11 Ill. 43.

[1] Jacubs *v.* Rylance, L. R. 17 Eq. 341.

[2] Doering *v.* Doering, 42 Ch. D. 203.

[3] Belknap *v.* Belknap, 87 Mass. 468.

[4] Jacubs *v.* Rylance, *supra*.

own default; nor will the rule exercise a restraining influence upon the trustee. The only possible basis for the rule is public policy; the argument being that to fully protect trust estates an assignee knowing the fiduciary position of his assignor, should be obliged to take the risk of a possible defalcation. It is submitted, however, that the policy of the situation should be clearly determined before fastening upon the assignee such a risk. In this case the policy is so doubtful that it offers no real justification for the rule.

The language of a recent Victoria case following the established English rule would make the rule even more comprehensive. *Cumming* v. *Austin*, 28 Vict. L. R 622. The court intimates that the assignee should be mulcted even where the assignment occurred before the assignor became trustee. The objections to the more restricted English rule here apply with even greater force. In addition, the argument of public policy fails entirely. For, even granting the rule as enforced in England, it would seem to be an unwarranted step to say that an assignee must be taken to have anticipated his assignor's becoming a trustee, and therefore to have assumed the risk of a future default. In addition, since every beneficiary may become a trustee, the existence of such a rule would seriously affect the freedom with which equitable interests might be transferred. The more restricted rule could only affect in that way the few cases of assignments by trustees. The one English decision on the point is contrary to the *dictum* in the principal case.[5] It is to be hoped that when the question arises for decision in the future, that *dictum* may be distinctly repudiated.

The Alabama Franchise Case. — Much attention has been attracted by the decision in the United States Supreme Court of the case of the negroes who applied for relief from what they claimed was the unconstitutionality of the recent Alabama franchise provisions. *Giles* v. *Harris*, 189 U. S. 475. The case is rather inadequately reported, and as a consequence there has been some hesitation as to the exact scope of the decision. The Alabama constitution provides for the registration of all electors, upon qualification according to certain requirements. An examination of the record from the circuit court discloses that the plaintiff, for himself and five thousand other negroes of the same county in Alabama, brought a bill for equitable relief against the defendants, the county registrars. The plaintiff alleged that he and his fellows were qualified under the requirements of the franchise provisions, but that the defendants denied them the right to register; further, that the constitutional franchise provisions are in contravention of the fourteenth and fifteenth amendments of the federal Constitution: wherefore he asked a decree placing his name on the registration list and declaring the whole registration scheme unconstitutional. A demurrer by the defendants was sustained on two grounds: first, that there was no federal jurisdiction; second, that the facts alleged do not come within the cognizance of equity. The plaintiff appealed to the Supreme Court of the United States under the statute [1] which allows certain questions to be brought before that court on direct appeal, among these questions being federal jurisdiction, and the constitutionality of a state constitution. The question of federal jurisdiction

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[5] Irby *v.* Irby, 25 Beav. 632.

[1] 26 St. c. 517, § 5, p. 827, 828.

only was certified to the Supreme Court. The court however decided that it could consider the case on both grounds of appeal. There were therefore only two questions before the court: (1) Does this bill present a case for federal jurisdiction? (2) Do the facts alleged call for equitable relief on the ground of the unconstitutionality of the franchise provisions? The first ground in the plaintiff's bill, — that he was denied registration although qualified according to the terms of the franchise law, — not being within the statute allowing direct appeals, was not before the court. With regard to federal jurisdiction, the court decided that, although there was no allegation in the bill that the matter involved at least $2,000,[2] since that fact was not taken advantage of in the court below, it could not be raised on appeal. It was then expressly assumed without decision that the case was in other respects [3] within the federal jurisdiction. The second question then remained. It was answered in the negative on the following three grounds: (1) Without discussion, that equity will not interfere to enforce a political right; (2) that precedent to granting the plaintiff's petition, the court would be obliged to declare unconstitutional the very franchise provisions under which the plaintiff asks to be registered; (3) that equity could not enforce its decree without policing the state to secure undiscriminating registration, which it cannot undertake to do.

While the first and third grounds for the court's decision are probably sound,[4] the second, on which the case was chiefly rested, is undoubtedly conclusive against the plaintiff. Under the statutory limitations of this appeal the court could only give relief by deciding that the registration scheme was unconstitutional. If, however, the provisions were unconstitutional, no one would have a right of registration. This plaintiff, therefore, would have no cause of action for the denial of registration, since there had been a violation of no right. On analysis, therefore, contrary to what might be thought, this case does not turn upon a question of constitutional law.

RECENT CASES.

ADVERSE POSSESSION — HOLDING UNDER DOWER RIGHT. — *Held*, that in the absence of a divestiture of her dower right, a widow's claim of ownership of land held in possession under such right is unavailing, of itself, to start the running of the statute of limitations as against the owner. *Allison* v. *Robinson*, 34 So. Rep. 966 (Ala.). For a discussion of the principles involved, see 14 HARV. L. REV. 149.

BANKRUPTCY — INVOLUNTARY PROCEEDINGS — ANSWER BY ATTACHING CREDITOR. — The Bankruptcy Act of 1898, after defining the term "creditor" as any one having a provable claim, provides that "creditors other than the original petitioners may . . . file an answer, and be heard in opposition to the prayer of the petition." *Held*, that an attaching creditor may contest the petition without surrendering his preference. *In re C. Moench & Sons Co.*, 123 Fed. Rep. 977 (Dist. Ct., W. D. N. Y.).

It has repeatedly been held that an attaching creditor cannot, without surrendering his preference, file a petition to have his debtor declared a bankrupt. *In re Burlington Malting Co.*, 109 Fed. Rep. 777; *In re Schenkein*, 113 Fed. Rep. 421. The principal

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[2] Required for jurisdiction. 25 St. c. 866, § 1, p. 434.
[3] U. S. Comp. St. 1901, § 1979.
[4] Green *v.* Mills, 69 Fed. Rep. 852.

case, however, is believed to be the first under the new law to raise the question of the right of a preferred creditor to resist the adjudication without surrendering his preference. Under the Act of 1867, which contained no express provision on the point, although the decisions are not entirely uniform, such a right was usually admitted, on the ground that, while such a creditor had not a provable claim, he was nevertheless interested in the result, since an adjudication of bankruptcy would dissolve his attachment. *In re Hatje*, 6 Biss. (U. S. D. C.) 436. The principal case holds the same reasoning applicable under the new statute. Although the rule laid down may doubtless be supported by strong reasons of practical justice, it must be admitted that the construction adopted seems inconsistent with the plain words of the Act.

BANKRUPTCY — PRIORITY OF CLAIMS — RIGHT OF PARTNERSHIP CREDITORS TO SHARE IN INDIVIDUAL ESTATE. — A partnership and both partners became insolvent. One of the partners was subsequently adjudged a bankrupt. It did not appear that the other had become solvent. There were no partnership assets. *Held*, that the partnership creditors are entitled to share *pro rata* with the individual creditors in the bankrupt's estate. *Conrader* v. *Cohen*, 121 Fed. Rep. 801 (C. C. A., Third Circ.).

The Bankruptcy Act of 1898, § 5, provides that a partnership may be adjudged a bankrupt, and that partnership property shall be appropriated to payment of partnership debts and individual property to payment of individual debts, the surplus only in either case to the payment of other claims. The provision was substantially the same in the Act of 1867. Where, however, there are no firm assets and no solvent living partners, the courts have generally made an exception to this rule by allowing all the creditors to share *pro rata*. *In re Downing*, 1 Dill. (U. S. C. C.) 33; *In re Greene*, 116 Fed. Rep. 118. This exception crept into the law as the result of a misconception in an early English case. *Ex parte Pinkerton*, 6 Ves. 814. That case confused forms of remedies with substantial rights, as is clearly shown in a recent case repudiating the exception. *In re Wilcox*, 94 Fed. Rep. 84. It is to be regretted that the court in the principal case follows blindly the weight of authority instead of interpreting the act in the light of the history of the question.

BANKS AND BANKING — POWER OF ATTORNEY TO DRAW ON A DEPOSIT. — The deceased instructed a savings bank to enter his wife's name with reference to his account, so that she might be able to draw on it equally with him. While he was on his death-bed, his wife had the account transferred to her individual name. Later his administrator sued the wife for the amount of the account. *Held*, that the amount must be returned. *Burns* v. *Burns*, 93 N. W. Rep. 1077 (Mich.). See NOTES, p. 122.

CEMETERIES — BURIED CORPSE NOT REALTY. — The New York Code of Civil Procedure, § 982, provides substantially that all actions involving any interest in real estate shall be brought in the county where the realty is situated. The plaintiffs, acting under this section, brought an action for the removal of their mother's body, interred in the defendant's cemetery, in the county where the cemetery was located. *Held*, that the action is not one involving realty. *Cohen* v. *Congregation Shearith Israel*, 85 N. Y. App. Div. 65.

Courts have frequently held, though such a holding was not essential to their decisions, that a corpse permanently buried becomes a part of the realty like other objects attached to the land. See *Meagher* v. *Driscoll*, 99 Mass. 281. It has long been held, however, that the coffin and shroud do not become part of the land. *State* v. *Doepke*, 68 Mo. 208. See 2 BL. COM. 429. Hence it would seem to follow that the inclosed body also remains distinct from the realty. A further reason for this view is found in the peculiar nature of the rights in a corpse. Compelled to take jurisdiction by the failure of the ecclesiastical courts, the common law now recognizes the existence of a right in those most concerned for purposes of the burial and protection of the cadaver. See 6 AM. L. REV. 182. This quasi-property right is held to continue after burial and not to exist solely in the proprietor of the burial ground. *Pierce* v. *Proprietors of Swan Point Cemetery*, 10 R. I. 227. For these reasons it would appear that the principal case represents the better view in deciding that the corpse remains wholly unincorporated with the realty. *In re Beekman St.*, 4 Bradf. (N. Y.) 503.

CONFLICT OF LAWS — JURISDICTION OVER TRUST CREATED ABROAD. — A domiciled Englishman married a Scotchwoman in Scotland. Personal property of the wife was put in settlement under Scotch law, a non-alienable, alimentary provision being made for the husband if he survived. The trustees were Englishmen. The husband survived and mortgaged his interest. The provision against alienation was valid by Scotch, but void by English law. The mortgagees claimed payment of the income. *Held*, that the mortgagees will prevail. *Re Fitzgerald*, [1903] 1 Ch. 933 (Eng., Ch. D.). See NOTES, p. 123.

CONSTITUTIONAL LAW — STATE CONTROL OF FEDERAL AGENCIES — NATIONAL BANKS. — The defendant was convicted under a statute of Iowa, making any officer of any bank criminally liable for receiving a deposit while having knowledge of the bank's insolvency. *Held*, that the statute is unconstitutional so far as it applies to the officers of national banks. *Easton* v. *Iowa*, 188 U. S. 220.

It is acknowledged that the states may, as a general rule, punish any act made criminal by their law, although the same act may also be punishable by the United States. *Moore* v. *Illinois*, 14 How. (U. S.) 13; *Jett* v. *Commonwealth*, 18 Gratt. (Va.) 933. The states may not, however, punish an act as criminal, when such punishment is an interference with an agency of the national government, such as a national bank is held to be. *Cf. Davis* v. *Elmira Savings Bank*, 161 U. S. 275. The question here is, therefore, whether the statute prevented the bank from being conducted in the manner contemplated by Congress. The Federal statutes do not specifically authorize banks to receive deposits under the circumstances referred to in the Iowa statute. Nevertheless, they make provisions as to insolvent banks so minute that the court seems right in holding that they are meant to exclude any additional regulation by the states. *Cf.* U. S. Rev. Sts. §§ 5226–5238, 5242. The Iowa statute, while in form a criminal law, is in effect a regulation of the business of the bank when insolvent. It is, therefore, inconsistent with the Federal statutes, and necessarily falls.

CONTEMPT — ACTS AND CONDUCT CONSTITUTING CONTEMPT — DISRESPECT OF COURT'S DECREE AGAINST ANOTHER. — The defendant trespassed on certain land. The court had previously enjoined other persons, who claimed that the land was public, from trespassing on the property, and the defendant knew of this injunction. *Held*, that the defendant is guilty of contempt of court. *Chisholm* v. *Caines*, 121 Fed. Rep. 397 (Circ. Ct., Dist. of S. C.).

No person is bound directly by an injunction, and hence no one can violate an injunction, unless he was a party to the injunction proceedings or a privy thereto. *Randall* v. *People*, 73 N. Y. 416. Though not bound directly, one may nevertheless, by aiding and abetting the person enjoined to violate the injunction, show such disregard of the court as to be in contempt. Such is the result of a number of cases. *In re Reese*, 107 Fed. Rep. 942; *Seaward* v. *Paterson*, [1897] 1 Ch. 545. The present case is a decided advance on those cases in that it punishes for contempt one who was neither a party, privy, nor abettor, but an independent trespasser. The result would seem to follow in this case that hereafter every trespasser on that land would be in contempt. Such an inroad upon the common law jurisdiction seems, however, indefensible. An ordinary trespasser would seem to be merely in disregard of the common law rules of property, not in contempt of the court's decision. Only a person claiming in the right already adjudicated would be trying violently to reopen the decree. Such a person might properly be held in contempt.

COPYRIGHTS — WHAT CONSTITUTES INFRINGEMENT. — The plaintiff was the publisher of the "Encyclopedia of American and English Law"; the defendant was compiling a work called the "Cyclopedia of Law and Procedure." The defendant gave to its editors lists of the cases cited in the plaintiff's books. The editors then examined the original cases and used them, together with other authorities, as the basis of their articles. but did not in any way refer to the text of the plaintiff's work. The plaintiff contended that this was an infringement of its copyright, and sought a preliminary injunction to restrain the publication of the defendant's Cyclopedia. *Held*, that the plaintiff is not entitled to an injunction. *Edward Thompson Co.* v. *American Law Book Co.*, 122 Fed. Rep. 922 (C. C. A., Second Circ.).

It is well agreed that the fact that the plaintiff's sources of information are open to all is not a defense, if the defendant has copied the plaintiff's work without independent investigation. It is equally clear that a person who has made a compilation of materials open to all cannot prevent others from making similar compilations on their own account. See *Gray* v. *Russell*, 1 Story (U. S. C. C.) 11. The difficulty comes in cases between these extremes. The rule has been laid down in England that one may not take another's work, verify it by reference to the original authorities, and then copy it bodily; on the other hand, an author may use another's work as a guide to common sources of information, provided that the final product is based on an independent examination of these sources. See *Morris* v. *Wright*, 5 Ch. App. 279. Applying this test to the principal case, the decision seems sound. There appears to be no American case on the precise point, but the tendency of the authorities is in favor of this view. *Cf. Mead* v. *West Publishing Co.*, 80 Fed. Rep. 380.

CORPORATIONS — CORPORATE POWERS AND THEIR EXERCISE — POWERS OF AN AGENT. — Negotiable bonds of the plaintiff corporation were brought by its treasurer,

without authority from the corporation, to the defendant to be sold. The defendant knew that the bonds belonged to the plaintiff, but had no reason to doubt the treasurer's authority to sell. The defendant negotiated the sale and the treasurer converted the proceeds. *Held*, that the defendant is liable for the value of the bonds. *Jennie Clarkson Home* v. *Chesapeake & O. R. Co.*, 83 N. Y. Supp. 913 (N. Y., Sup. Ct.).

Since the bonds were negotiable, the defendant acquired legal title to them. And as a person dealing innocently with a legal title is not liable to the equitable owner, the defendant cannot be held unless he is chargeable with notice of the treasurer's breach of duty. *Cooper* v. *Illinois Cent. R. Co.*, 38 N. Y. App. Div. 22. The court considers that the defendant was bound to know the treasurer's authority. Many courts say that one must at his peril ascertain the authority of corporate agents. *Alexander* v. *Cauldwell*, 83 N. Y. 480. To this broad statement, however, there should be limitations. While the public may well be charged with notice of limits imposed by the charter or other public documents, it seems too much to require that they know facts as to the internal management of the corporation. *Louisville, etc., R. Co.* v. *Louisville Trust Co.*, 174 U. S. 552; *Walker* v. *Detroit Transit R. Co.*, 47 Mich. 338. As the treasurer's authority in the principal case apparently depended on an act not publicly recorded, namely, a vote of the directors, it is harsh to hold the defendant bound at his peril to know that authority. *Akin* v. *Blanchard*, 32 Barb. (N. Y.) 527.

Customs Duties — Power of Treasury Department to Remove Goods from District. — The plaintiffs had imported diamonds into Providence *via* New York, and had paid the estimated duty, but no appraisal had been made. The collector of the port of Providence, under the orders of the Treasury Department, was about to send them to New York to be appraised, when the defendants moved for a preliminary injunction restraining him. *Held*, that the injunction will be granted. *Bruhl Bros. & Co.* v. *Wilson*, 123 Fed. Rep. 957 (Circ. Ct., Dist. of R. I.).

Apparently this is a case of first impression. The court says that any direction by the Treasury to transport the goods is unauthorized by law, on the ground that, if it is to be done by a Treasury agent, it would be in violation of the statute making the collector custodian, or, if by the collector himself, it would be forcing him to act outside his district. *Cf. Morrill* v. *Jones*, 106 U. S. 466, and *United States* v. *Adams*, 24 Fed. Rep. 348. Although an earlier case decided that, if necessary, samples could be removed for appraisal, it contained a *dictum* in accord with the present decision as to the removal of the bulk of the goods. *Goodsell* v. *Briggs*, 1 Holmes (U. S. C. C.) 299. Another argument of great weight with the court was that, if the Treasury Department is allowed this power, it virtually nullifies the statute providing for immediate transportation to the port of ultimate destination. U. S. Comp. St. 1901, p. 1964. The effect of this decision, which certainly seems sound, will be to benefit importers outside New York by making their importations less subject to delay and easier to conceal from competitors.

Electric Wires — Liability of a Person Supplying Electricity to Another's Wires. — The defendant supplied power for an electric railway, but the lines were owned and operated by the railway-company. Through defective insulation of the wires of the railway-company the plaintiff's intestate was killed by an electric shock. *Held*, that the defendant is liable. *Maysville Gas Co.* v. *Thomas' Adm'r*, 75 S. W. Rep. 1129 (Ky.).

This is apparently the first judicial expression upon the liability of electric power companies for damage done by the current after it leaves their wires. The ground of the decision is that the defendant is under a duty to see that the wires are properly insulated before charging them with electricity. While the result reached in the case may be correct under the particular facts, the rule laid down by the court seems questionable, and likely to work injustice in many cases if generally followed. The true rule in this case, as in all cases of negligence, should be that the defendant owes a duty of ordinary care under the circumstances, the degree of care being always commensurate with the dangers incident to the nature of the business. See *Denver, etc., Co.* v. *Simpson*, 21 Col. 371. Whether or not a particular duty is included under this general rule should be a question of fact for the jury.

Equity — Discretion to Refuse to Aid an Illegal Undertaking. — The plaintiff sued to restrain the defendant from obtaining or selling quotations of prices of commodities dealt in on the floor of the plaintiff's exchange. The great majority of the contracts made on the exchange were gambling transactions. *Held*, that the plaintiff's property right in the quotation is so infected with illegality that a court of equity will not protect it. *Board of Trade of Chicago* v. *L. A. Kinsey Co.*, 35 Chic. Leg. News. 435 (U. S. Circ. Ct., Dist. of Ind.).

For a discussion of the principles involved, see 16 Harv. L. Rev. 444.

EVIDENCE — TESTIMONY GIVEN AT A FORMER TRIAL — JOINT DEFENDANTS. — Two defendants were jointly indicted for larceny. At a former trial of one of them upon the same charge, a witness testified in his behalf. The witness having since died, his testimony was offered in evidence in the present trial by the former defendant, but on the objection of the co-defendant was excluded. *Held*, that the evidence is admissible so far as it concerns the former defendant. *State* v. *Milam*, 43 S. E. Rep. 677 (S. C.).

Testimony given at a former trial by a witness since deceased is admissible if the issues and parties of the two trials are identical. *Orr* v. *Hadley*, 36 N. H. 575. If, in the second trial, one of two original joint-defendants is omitted, the testimony of a deceased witness for the defense is still admissible. *Wright* v. *Doe* d. *Tatham*, 1 A. & E 3. What is essential is that the party against whom the evidence is now introduced should have had an opportunity to cross-examine at the former trial. In the present case, while the prosecution had the opportunity of cross-examining the deceased witness, and cannot now exclude his testimony, the present co-defendant obviously may be prejudiced by testimony which he had no opportunity to cross-examine. On the other hand, considerable harm may be done the original defendant by excluding testimony in his behalf. For this reason, if the prejudice to the co-defendant be merely remote and inferential, the testimony might be admitted so far as concerns the former defendant. But if the prejudice to the co-defendant be immediate and direct, it would seem that the testimony should be excluded.

GRATUITOUS UNDERTAKINGS — LIABILITY OF AGENT. — The defendant, an insurance agent, gratuitously offered to place additional insurance for the plaintiff and to notify the other companies of the increase. He neglected the notification, and, as a result, when the premises burned, the plaintiff was forced to settle at a loss. *Held*, that the defendant is liable. *Barber* v. *Jones*, 2 Can. L. Rev. 658 (Sept. 1903). See NOTES, p. 126.

INJUNCTIONS — PROTECTION OF CONTRACT RIGHTS BY ENJOINING ACTS AGAINST THIRD PERSONS. — The plaintiff had large contracts both for the purchase of coal from mine owners and for its delivery to customers. The defendants were maintaining a strike by means of intimidation, and were unlawfully preventing others from working the mines from which, according to the plaintiff's contracts, the coal was to be supplied. The plaintiff applied for an injunction to restrain such unlawful acts. *Held*, that the injunction will be granted. *Carroll* v. *Chesapeake & O. Co.*, 124 Fed. Rep. 305 (C. C. A., Fourth Circ.).

This decision affirms the opinion of the Circuit Court in the same case, which was discussed in 16 HARV. L. REV. 600.

INSURANCE — AMOUNT OF RECOVERY. — A partial loss occurred under a policy of fire insurance. The cost of restoring the building to its former condition would have been thirty thousand dollars. Owing to the building laws, however, the structure could be repaired only by the expenditure of forty-five thousand dollars. *Held*, that the latter amount is the measure of the insurer's liability. *Hewins* v. *London Assur. Corp.*, 68 N. E. Rep. 62 (Mass.).

A fire insurance policy is a contract of indemnity: hence the measure of damages is the difference between the actual value of the property immediately before and immediately after the loss, and not necessarily the cost of restoration. *State Ins. Co.* v. *Taylor*, 14 Col. 499. Accordingly if the restoration of the injured building is forbidden by statute, its value being totally annihilated, the loss is properly held to be total. *Larkin* v. *Glens Falls Ins. Co.*, 80 Minn. 527. The court in the principal case, however, would appear to be mistaken in considering its decision to be a necessary deduction from this. The increased cost of repairs due to the building laws would probably result in an increased value in the renovated building due to the use of the better materials or to the more substantial construction required, though the increase would not necessarily amount to the increase in the cost of repairs necessitated by the statutes. To the extent of this increased value, the insured has suffered no pecuniary loss. Consequently it would seem that the referee should have been instructed to ascertain and deduct this amount from the insurer's liability. *Waynesboro Fire Ins. Co.* v. *Creaton*, 98 Pa. St. 451.

INSURANCE — EFFECT OF FAILURE TO PAY NOTES GIVEN FOR PREMIUM. — The insured, being unable to pay a certain annual premium on a life insurance policy, gave his promissory note, which provided that if the note was not paid at maturity the policy should be void. The policy itself contained no stipulation to that effect. The

note was not paid at maturity. Upon the subsequent death of the insured this action was brought on the policy. *Held*, that the policy is rendered void by the non-payment of the note. *Ressler* v. *Fidelity Mut. Life Ins. Co.*, 75 S. W. Rep. 735 (Tenn.).

It is generally recognized that failure to pay premiums when due releases the insurer from liability on a contract of insurance. When a note, containing a clause of forfeiture for non-payment at maturity, no such stipulation having been inserted in the policy, is taken for a cash premium, the legal effect of such non-payment is not clearly established. It has been held that the insurer is thereby merely given the option of declaring a forfeiture, which must be asserted by some affirmative act. *Mut. Life Ins. Co.* v. *French*, 30 Oh. St. 240. Other courts hold that the non-payment, *ipso facto*, renders the policy void. *Holly* v. *Metropolitan Life Ins. Co.*, 105 N. Y. 437; *Frank* v. *Sun Life Assurance Co.*, 20 Ont. App. 564. The latter view, which finds further support in the principal case, seems theoretically sound. The acceptance of the note operates as a waiver for the specified time of the company's right to avoid the contract, and it must follow that if the note is not paid at maturity the insurer's liability on the contract thereupon ceases, the forfeiture clause being important only as precluding the possibility of finding a further waiver.

INSURANCE — MUTUAL BENEFIT INSURANCE — AMENDMENT OF BY-LAWS. — According to the by-laws of a mutual benefit association, of which the plaintiff was a member, his dues were fixed at a certain sum. An amendment materially increasing his monthly payment was passed without his consent. *Held*, that the amendment is void as to him. *Miller* v. *Tuttle*, 73 Pac. Rep. 88 (Kan.). See NOTES, p. 127.

JUDGMENTS — SETTING ASIDE — FAILURE TO MAKE DEFENSE. — The defendant knew the day on which trial was to take place. On that day his attorney telegraphed him not to attend. The attorney, although he knew of a defense, failed to make it, and judgment was given for the plaintiff. *Held*, that the judgment should be set aside. *Barton* v. *Harker*, 55 Atl. Rep. 105 (N. J., Sup. Ct.).

Where a party who has a good defense on the merits and has used all reasonable diligence, has nevertheless failed to make his defense on time, there is a strong argument for reopening the case. The court here sets aside the judgment on the ground that the defendant was misled by his counsel. A few courts, usually influenced by statutes, have gone so far as to consider erroneous advice by counsel a sufficient excuse for failure to defend. *Whereatt* v. *Ellis*, 70 Wis. 207. However, if justice is to be speedily administered, judgments should be reopened only for urgent reasons. Accordingly when the lack of defense is due to erroneous advice, rather than to ignorance of facts, most courts consider the excuse insufficient. *Cox* v. *Armstrong*, 43 S. W. Rep. 189 (Ky.); *Anderson* v. *Carr*, 7 N. Y. Supp. 281. Again, the negligence of the counsel in the principal case may, as a matter of agency, well be treated as the negligence of the defendant. *Ex parte Walker*, 54 Ala. 577. The defendant's excuse for omitting his defense, therefore, hardly justifies setting aside the judgment.

LEGACIES AND DEVISES — BEQUESTS VOIDABLE BY STATUTE — POWER TO INVOKE STATUTE. — A statute provided that no person having a husband, wife, child, or parent should bequeath to any charitable or religious association more than one-half of his estate after the payment of his debts. A married woman whose husband, by an ante-nuptial agreement, had released all right of inheritance from her, made a will in violation of the statute and died, leaving an estate consisting solely of personal property, which, had she died intestate, would, in the absence of the release, have descended entirely upon her husband. *Held*, that the next of kin cannot invoke the operation of the statute. *Board of Home Missions, etc.* v. *Wilcox*, 85 N. Y. App. Div. 132.

The courts of New York have experienced considerable difficulty in determining the rights of the next of kin under the above statute. The early cases held that the statute was peremptory, and might be insisted upon by any relative who would derive a direct benefit therefrom. *Harris* v. *American Bible Society*, 2 Abb. App. Dec. 316. A late case goes to the other extreme by deciding that the purpose of the statute is merely to protect the interests of the persons expressly designated; and that, if the next of kin would take nothing through such a person, he cannot take advantage of the statute. *Frazer* v. *Hoguet*, 65 N. Y. App. Div. 192. The principal case, however, by an express modification of that doctrine, declares that the next of kin should be allowed to invoke the statute, but only where he would inherit in connection with one of the persons named therein, and not, as here, only in substitution for him. This construction, while perfectly possible, and in line with the most recent cases, is certainly opposed to the spirit of all of the earlier decisions. *McKeown* v. *Officer*, 6 N. Y. Supp. 201.

MUNICIPAL CORPORATIONS — RIGHT OF CORPORATOR TO INSPECT MUNICIPAL RECORDS — ENFORCEMENT BY MANDAMUS. — A tax-payer of a municipal corporation, believing that the public funds had been mismanaged, applied to the mayor for permission to make a general inspection of the books of the corporation. The request was refused. *Held*, that the mayor will be compelled by a writ of mandamus to permit such an inspection. *State* v. *Williams*, 75 S. W. Rep. 948 (Tenn.).

Though the right of a corporator to inspect municipal records where his interest is private, and the inspection desired is restricted, is established, his right to a general inspection, where his interest is public, has not been so well recognized. Several early English cases proclaim such a right, *Herbert* v. *Ashburner*, 1 Wils. 297; but in very few of them was affirmance of the right necessary to the decision. See *Rex* v. *Merchant Tailors' Co.*, 2 B. & Ad. 115. The few American cases in point are in conflict. *State* v. *Williams*, 41 N. J. Law 332; *People* v. *Cornell*, 35 How. Pr. (N. Y.) 31, reversing 47 Barb. (N. Y.) 329. In the case of private corporations the right of a stockholder to a general inspection of the corporate books is in a similar state of uncertainty, although recognized in most states by statute. See *Re Steinway*, 159 N. Y. 250. The chief objection to the recognition of such a right is that it would be greatly abused and that corporate management would be seriously impeded. But the fact that the issuance of a writ of mandamus is almost wholly discretionary seems to obviate the difficulty, since the court need issue the writ only where under the circumstances the application seems reasonable.

NEGLIGENCE — LIABILITY FOR MALPRACTICE — CHRISTIAN SCIENCE. — The defendant, a Christian Scientist, who held himself out as competent to treat diseases, undertook for reward to treat the plaintiff for appendicitis. The treatment was that usually given by Christian Science "healers" in such cases, but the plaintiff suffered injury. *Held*, that the defendant is not liable on a count for negligence. *Speed* v. *Tomlinson*, N. H. Sup. Ct. Oct. 6, 1903.

The decision is placed on the ground that the defendant's duty was determined by his profession of skill, which extended no further than skill in the practice of Christian Science. It is well settled that a person professing to follow one system of medical treatment cannot be expected by his employer to practise any other, *Bowman* v. *Woods*, 1 Greene (Ia.) 441; and it is also held that one who treats a patient without having or pretending to have medical skill incurs no professional responsibility. *Higgins* v. *McCabe*, 126 Mass. 13. It would seem, therefore, that, whether Christian Science be considered a school of medicine or a humbug, the case is sound law. A Wisconsin case in which the liability of a clairvoyant physician for malpractice was considered was decided the other way, on the ground that clairvoyance was not a school of medicine. *Nelson* v. *Harrington*, 72 Wis. 591. That decision is hard to support, however, and the principal case is believed to represent the better view.

PARENT AND CHILD — PARENT'S RIGHTS IN RELIGIOUS TRAINING OF CHILD. — Children had been taken from their father, a Catholic, because of his unfitness to control them. Their aunt, a Protestant, and their grandmother, a Catholic, both petitioned for their custody. *Held*, that custody will be awarded to the grandmother since she is of the same religion as the father. *Matter of Jacquet*, 40 N. Y. Misc. 575. See NOTES, p. 128.

PROXIMATE CAUSE — CONCURRENT CAUSES. — The plaintiff's parent died from the combined effects of injuries caused by the defendant's negligence, and of a subsequent illness. By statute, actions for personal injuries survived after death only in case the death was not caused by the injuries. The court instructed the jury that if death would not have resulted from the illness alone, but was in part caused by the injuries, the death was the result of such injuries. *Held*, that the charge is erroneous. *Ellyson* v. *International, etc., R. R. Co.*, 75 S. W. Rep. 868 (Tex., Civ. App.).

The law is settled that if, by reason of the plaintiff's peculiar physical condition, the defendant's negligence leads to unusually severe injuries, the loss is the direct consequence of the negligence, and the plaintiff can recover for the whole. *Louisville, etc., R. Co.* v. *Falvey*, 104 Ind. 409. Cases in which an intervening illness, unconnected with the defendant's wrongful act, becomes an important factor in the injurious consequences are much more rare, and the legal responsibility is less clear. It has been held that the defendant can escape liability only if the intervening illness must have produced the fatal result quite independently of the injury. *Louisville, etc., R. R. Co.* v. *Jones*, 3 So. Rep. 902 (Ala.). Such a principle necessarily makes the *causa sine qua non* the legal cause. The principal case, however, takes the view that the defendant should not be held unless the negligent act was not only one of the causes, but the

prominent, efficient cause of the injury. It is believed that this rule leads to the fairer answer to what is, after all, the common sense question involved, namely: Did the defendant cause this death? *Pierce* v. *Michel*, 60 Mo. App. 187.

PROXIMATE CAUSE — INTERVENING ACTS OF THIRD PARTY. — The defendant company, which was under a duty to inspect the brakes on its cars, allowed a shipper to move a car which had not been inspected, and in consequence of the defective condition of the brakes the plaintiff was injured. *Held*, that the defendant cannot escape liability merely because the car was handled by a shipper. *Boyd* v. *Seaboard, etc., R. Co.*, 45 S E. Rep. 186 (S. C.).

For a discussion of the principles involved see 16 HARV. L. REV. 227.

PROXIMATE CAUSE -- NEGLIGENT INJURY RESULTING IN SUICIDE. — The plaintiff's testator became insane and committed suicide in consequence of an injury negligently inflicted by the defendant. *Held*, that the defendant is not liable for the suicide. *Daniels* v. *New York, etc., R. R. Co.*, 67 N. E Rep. 424 (Mass.). See NOTES, p. 125.

RESCISSION — MISTAKE OF FACT. — The plaintiff, the beneficiary under a life insurance policy, agreed to assign his interest to the defendant. Both parties were ignorant of the fact that the insured was already dead. The defendant learned of the death before the assignment, but concealed his knowledge. *Held*, that the assignment may be set aside. *Scott* v. *Coulson*, [1903] 2 Ch. 249.

This decision affirms the holding of the lower court, which was discussed in 16 HARV. L. REV. 451.

RESCISSION — MISTAKE OF LAW. — The owner of certain interests in land encumbered by the plaintiff's mortgages died, leaving as heirs his widow and infant children. The plaintiff agreed to surrender the mortgages, and in return the widow agreed to convey all of decedent's interest in the land. Both parties overlooked the fact that the children were entitled to two-thirds of decedent's interest. After conveyance the plaintiff brought this action asking for a reinstatement of the mortgages. *Held*, that although the mistake is one of law the plaintiff is entitled to relief. *Hutchison* v. *Fuller*, 45 S. E. Rep. 164 (S. C.).

Although it is commonly laid down that mistake of law does not excuse, nevertheless equity does grant relief under the circumstances of this case. *Fullen* v. *Providence County Savings Bank*, 14 R. I. 363. This result is reached on various grounds. Often the case is treated as an exception to the general rule, based on the peculiar facts, *Benson* v. *Markoe*, 37 Minn. 30; or the mistake of law is considered analogous to, if not identical with, a mistake of fact. *Renard* v. *Clink*, 91 Mich. 1. Obviously the general rule was first adopted as a matter of policy rather than of logical necessity, and therefore is inapplicable when broader equitable considerations demand relief. Accordingly it seems a more accurate statement of the law to say that in general equity will interfere to prevent the unjust enrichment of one party and the unjust impoverishment of the other, whether caused by mistake of law or by mistake of fact; but that the hardship resulting from mistake of law must be so marked as to outweigh the practical danger of allowing a defendant to plead that he was mistaken as to the law.

RESTRICTIVE AGREEMENTS AS TO THE USE OF PROPERTY — PLAINTIFF'S LACHES AS A BAR TO EQUITABLE RELIEF. — The plaintiff laid out a tract of land as a seashore resort. All deeds of land sold contained a covenant that no business should be carried on upon the Lord's Day, together with other provisions intended to secure the whole tract as a religious resort. The plaintiff sought an injunction to restrain the defendant, who held under such a deed, from conducting a drug store on Sunday. The defendant admitted the breach, but maintained that several other grantees had, for a long time, conducted bath-houses and other businesses on Sunday, without serious objection on the part of the plaintiff. *Held*, that the plaintiff is not entitled to equitable relief. *Ocean City Association* v. *Chalfant*, 55 Atl. Rep. 801 (N. J. Eq.).

The court, apparently, takes the ground that, since the plaintiff has not enforced the covenants of other grantees, it is not fair that it should enforce the defendant's covenant. Two decisions by Lord Eldon are cited which contain expressions supporting this view. See *Roper* v. *Williams*, 1 Turn. & R. 18; and *Duke of Bedford* v. *Trustees*, 2 Myl. & K. 552. These *dicta*, however, are now repudiated, so far as they apply to cases in which, as here, the defendant has made no large expenditures in reliance on the plaintiff's acquiescence. *Knight* v. *Simmonds*, [1896] 2 Ch. 294. The modern authorities show that the true test is, rather, whether the general condition, in view of which the covenant was made, has so changed that an injunction to enforce it will simply annoy the defendant without really benefiting the plaintiff. *Knight* v. *Simmonds*,

supra; *Lattimer* v. *Livermore*, 72 N. Y. 174. It does not appear in the principal case that the plaintiff's failure to enforce other covenants had so changed the character of the place that the enforcement of the defendant's covenant would be of no substantial benefit, and, this being so, the decision can hardly be supported.

SALES — WARRANTIES — REMEDIES FOR BREACH. — The defendant sold personal property with warranty of title to the plaintiff, who resold with a similar warranty. In consequence of a title outstanding in a third person, the chattel was recovered from this vendee, who in turn recovered judgment against the plaintiff for the purchase money and costs, and also for the costs of the previous action. The defendant, though requested by the plaintiff to defend this action, failed to do so. The plaintiff then brought the present action for breach of warranty to recover the amount of the judgment recovered against him. *Held*, that the plaintiff may not recover the costs of the previous suits. *Smith* v. *Williams*, 45 S. E. Rep. 394 (Ga.).

Fairness requires that the warrantor of title should not be subjected against his will to the costs of more than one suit. In an action for breach of warranty of realty, the costs of prior litigation cannot be recovered unless the warrantor was notified of the suit and given opportunity to defend. *Point Street Iron Works* v. *Turner*, 14 R. I. 122. Upon this analogy, the rule has been that the warrantor of chattels who after notice neglects to defend against an adverse claim, is liable for all damages and costs incurred in reasonable defense. *Lewis* v. *Peake*, 7 Taunt. 153. This rule in England has been limited to cases in which the vendor might reasonably have contemplated at the time of the warranty that the probable result of breach would be an action by the sub-vendee. *Hammond* v. *Bussey*, 20 Q. B. D. 79. Since the present defendant appeared unapprised of the suit against the plaintiff's vendee, he cannot be liable for the costs of that suit. But the costs of the suit between the plaintiff and his vendee, which the defendant had opportunity to defend, seem fairly recoverable.

TAXATION — PROPERTY SUBJECT TO TAXATION — BEQUEST TO MUNICIPALITY. — The United States levied a succession tax on a bequest made to a municipality for a public purpose. The tax was claimed to be invalid because imposed on a state agency. *Held*, that the tax is valid. *Snyder* v. *Bettman*, 23 Sup. Ct. Rep. 803. White, Fuller, and Peckham, JJ., dissented.

It has been decided that the United States has power to impose succession taxes. *Knowlton* v. *Moore*, 178 U. S. 41. It is submitted that a succession tax may be on either the testator's privilege of devising or the beneficiary's privilege of receiving. It has been immaterial in previous cases which of these privileges was the object of the tax, but the principal case apparently turns on that point. If the tax is on the city's privilege of receiving, it should be held invalid, as the Federal government cannot properly tax the privileges of an agent of a state. *Cf. Pollock* v. *Farmers' Loan, etc., Co.*, 157 U. S. 429. If, on the other hand, as would appear from the phrasing of the statute, the tax is on the privilege of devising, it is imposed not on a privilege of the city, but of the testator, even though in the end the burden may fall on the city. *United States* v. *Perkins*, 163 U. S. 625. The result of the majority in the principal case, therefore, is entirely supportable. *Cf. Plummer* v. *Coler*, 178 U. S. 115.

TORTS — INTERFERENCE WITH OCCUPATION — BLACKLISTING. — The plaintiffs were members of a union. The defendant company, with intent to destroy the union, had discharged some of its members and intended to discharge all others. The discharged employees were prevented from obtaining new employment by means of a blacklist which contained their names and which was shown to other employers. *Held*, that an injunction will not be granted to restrain the defendant from maintaining the blacklist. *Boyer* v. *Western Union Tel. Co.*, 124 Fed. Rep. 246 (Circ. Ct., E. D. Mo.).

An injunction to restrain employees from boycotting an employer will be granted. *Casey* v. *Cincinnati Typographical Union No. 3*, 45 Fed. Rep. 135. The crushing power of a boycott, however, which makes it a danger to the community, is essentially the product of exclusion from business intercourse with others. *Crump* v. *Commonwealth*, 84 Va. 927. Had the defendant, instead of merely showing his list, combined with other employers to prevent the plaintiffs from obtaining employment with third persons, the analogy to a boycott would seem complete, and there would be no apparent reason why equity should refuse to grant an injunction. But on principle an agreement of employers, in order more effectively to compete with employees, which seems to have been the real object in the present case, not to employ a particular person, is not distinguishable from an agreement of laborers, on similar grounds, not to work for a particular person. The latter, which is merely a strike, is recognized as legal. However, the relatively greater power of oppression controlled by a combination of employers has led some courts to declare such a combination illegal. *Mattison* v. *Lake Shore, etc.*,

R. R. Co., 3 Oh. S. C. & C. P. 526. In the absence of combination, the decisions on the point, though few in number, support the rule of the principal case. *Worthington* v. *Waring*, 157 Mass. 421.

TRADE UNIONS — STRIKES — COMPETITION AS JUSTIFICATION FOR PROCURING DISCHARGE OF FELLOW EMPLOYEE. — The defendants, members of a trade union, by means of a strike procured the discharge of the plaintiff, as a non-union man. The plaintiff had applied for admission into the union, and had been refused. The defendants had no malicious motive, but wished only to strengthen their union by excluding from employment all those considered by them unfit for admission to its membership. *Held*, that the defendants are not liable. *Martell* v. *Victorian Coal Miners' Ass'n*, 25 Austr. L. T. 40 (Victoria, Sup. Ct.).

The plaintiff, formerly treasurer of the defendant union, became indebted to it through mismanagement of the union's funds. The union, in order to enforce the payment of the debt, but without any purpose to punish the plaintiff, expelled him, and thereafter, by threatened strikes, prevented him from getting or retaining work. The members of the union had no personal objection to working with the plaintiff. *Held*, that the union is liable for the damage caused to the plaintiff. *Giblan* v. *National Amalgamated Labourers' Union, etc.*, 19 T. L. R. 708 (Eng., C. A.).

By an ever increasing weight of authority it seems clear that it is actionable to induce an employer by a threatened strike not to employ a workman, except where justification is shown. For a discussion of this principle, see 15 HARV. L. REV. 427–445, 482. Difficulty most frequently arises in determining what amounts to a justification. *Cf.* Lord Justice Romer in *Giblan* v. *National Amalgamated Labourers' Union, etc., supra.* The present cases are valuable not only in more firmly establishing the general rule of liability, but also in aiding to define the limits of the most common justification, competition. *Cf. Mogul S. S. Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25; *Bowen* v. *Matheson*, 14 Allen (Mass.) 499. The right to compete would seem to include both the right to exclude competitors from the field, by the use of means which are not *per se* illegal, and the right to refuse competitors admission to the defendant organization where the members so wish. On the other hand, the right of competition would not seem to include the right to collect debts, as a debtor is not a competitor of his creditor. Nor indeed is the purpose to collect a debt any justification, for the proper method of accomplishing that end is through the courts.

TRANSFER OF STOCK — RECOVERY FROM TRANSFEREE OF FORGED TRANSFER. — The defendant, an innocent purchaser of a forged transfer of stock, presented it to the plaintiff corporation, which registered him as a shareholder. He subsequently transferred to an innocent purchaser for value to whom the plaintiff issued certificates of registration. Neither the plaintiff nor the defendant was negligent. The plaintiff, being obliged to reinstate the original holder of the stock, sued the defendant for indemnity. *Held*, that the plaintiff cannot recover. *Mayor, etc., of Sheffield* v. *Barclay*, 19 T. L. R. 714 (Eng., C. A.).

For a discussion of the decision in the lower court, see 16 HARV. L. REV. 228.

TRUSTS — ASSIGNMENT OF TRUSTEE'S BENEFICIAL INTEREST — EFFECT OF TRUSTEE'S DEFAULT. — A trustee, who was also a beneficiary under the trust, assigned his beneficial interest and subsequently committed a defalcation. *Held*, that the amount of the trustee's defalcation may be deducted from the share of his assignee. *Cumming* v. *Austin*, 28 Vict. L. R. 622. See NOTES, p. 130.

WATERS AND WATERCOURSES — RIGHT TO DIVERT PERCOLATING WATER. — The defendant drained off the percolating water in his land for purposes other than the improvement of the premises or his own beneficial use, and thereby injured the plaintiff's water supply. *Held*, that the defendant will be restrained from so doing. *Stillwater Water Co.* v. *Farmer*, 93 N. W. Rep. 907 (Minn.).

The English doctrine recognizes the absolute right of the landowner to divert percolating waters. *Chasemore* v. *Richards*, 7 H. L. Cas. 349. But the American courts have never gone so far. Wherever interference with percolating waters has been allowed it has been incident to a reasonable use of the land. See *Smith* v. *City of Brooklyn*, 18 N. Y. App. Div. 340. Diversion for any other purpose has been expressly decided to be unlawful. *Katz* v. *Walkinshaw*, 70 Pac. Rep. 663 (Cal.). The decision in the principal case is in accord with previous American cases on the point, and with the general tendency of the law of this country to restrict the right of interference with waters of this character. On principle, the doctrine seems clearly sound, as tending to protect the one party from wanton injury while assuring to the other the free beneficial use of his property.

WATERS AND WATERCOURSES — RIGHTS OF NON-RIPARIAN OWNERS. — The plaintiffs, neither owning nor leasing any land abutting on a river, leased from a power company the right to draw water from the power-canals which it had dug above its dam upon the river. A city higher up the stream was impliedly authorized by statute to drain its sewage into the stream. *Held*, that the plaintiffs can recover in an action against the city for pollution of the water. *Doremus* v. *City of Paterson*, 55 Atl. Rep. 304 (N. J., C. A.).

For a discussion of the decision in the lower court, see 16 HARV. L. REV. 145.

WILLS — CONSTRUCTION — EXTRINSIC EVIDENCE. — The testator made certain pecuniary bequests by his will. Subsequently he made certain smaller pecuniary bequests to several of the same legatees without stating whether these were to be substitutionary or cumulative. *Held*, that parol evidence that the testator knew that his estate was decreasing and that it might not be able to meet all the bequests in the will, is admissible to prove that the legacies in the codicil were intended to be substitutional. *Gould* v. *Chamberlain*, 68 N. E. Rep. 39 (Mass.).

Extrinsic evidence is necessarily admitted to identify the persons and things referred to in any writing. *Webster* v. *Morris*, 66 Wis. 366. But apart from this, the general rule is that a will, like other formal writings, must be construed solely by an inspection of the instrument itself; for otherwise no man could draw up his will with any certainty as to its effect. *Jackson* v. *Alsop*, 67 Conn. 249. An apparent exception exists where parol evidence is admitted to rebut an equitable presumption. *Livermore* v. *Aldrich*, 59 Mass. 431. The exception, however, is apparent only; for the evidence is admitted only to uphold the literal interpretation of the document by rebutting the equitable presumption to the contrary; and it is not admitted to support the equitable presumption in contradiction of the writing *Hurst* v. *Beach*, 5 Madd. 351. As the evidence in the principal case was offered to rebut the strict construction of the documents, it would seem that it ought to have been excluded. *Wilson* v. *O'Leary*, 7 Ch. App. 448. There are, however, previous *dicta* which appear to support the position of the court. See *Crocker* v. *Crocker*, 28 Mass. 252, 256.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

CLUB TRUSTEES' RIGHT TO INDEMNITY. — It has been held by the Judicial Committee of the Privy Council that a *cestui que trust* of stock is personally bound to indemnify the trustee against expenses incurred by reason of the latter's legal title. *Hardoon* v. *Belilios*, [1901] A. C. 118. The same court recently decided that club trustees have no rights of indemnity against a member for liabilities incurred under a lease after the dissolution of the club. *Wise* v. *Perpetual Trustee Co. Ltd.*, [1903] A. C. 139. The court distinguished the cases on the ground that the recognized terms of club membership limit the liability of each member to the amount of his subscription. With this distinction a recent writer takes issue. *Club Trustees' Right to Indemnity: A Criticism of Wise* v. *Perpetual Trustee Co. Ltd.*, by T. Cyprian Williams, 19 L. Quart. Rev. 386 (Oct., 1903). The author clearly shows that the cases relied on by the court hold merely that no power is given to club officers to pledge the credit of members beyond the amount of dues payable. If, then, he argues, the ordinary liability incident to equitable ownership be lacking here, it must be because of some understanding between the parties. But no such agreement can possibly be implied in fact since the members derive all the benefit and the trustees none from the transaction. This criticism seems well founded. But Mr. Williams also suggests that any such agreement would be void as against the policy of the law, because it separates the advantages from the burdens of property. But this position, as stated, seems clearly untenable. See *Ex parte Chippendale*, 4 De G., M. & G. *19, *52.

The author would, however, support the actual decision on two grounds: first, because the claim made was based on the theory of a several liability in each club member; and, second, because the club had been dissolved before the definite claims against the trustees matured. The latter distinction seems unsound. Mr. Williams argues that, since each member may resign at will and so free himself from all liabilities not already ripened into definite claims, all the members may by dissolving the club obtain a like immunity. But the conclusion does not follow from the premise. The equitable interest of a single resigning member passes by mutual consent to the remaining members. But the whole body of members cannot without finding a consenting transferee divest themselves of the equitable title any more than they could free themselves of a corresponding legal title. With the equitable interest the liability incident thereto would, then, survive the dissolution.

Mr. Williams is in sympathy with the doctrine of *Hardoon* v. *Belilios*, the correctness of which he assumes. The case has not, however, escaped attack. It has been urged that the trustee voluntarily accepted the responsibilities of a legal owner, and if he wished rights not belonging to him as such, he should have contracted for them. PERRY, TRUSTS, 5th ed. § 485, (a). But this involves a *petitio principii*. What he contemplated was a legal ownership *in trust*, with whatever rights are incident to such a position. The very question is as to the extent of those rights. The trustee cannot compel the *cestui* to assume the legal title. *Moore* v. *Greg*, 2 Ph. 717. It is said that the result is the same if the *cestui* is to be indirectly exposed to the burdens of legal ownership. But it should be remembered that pecuniary liability is only one of the burdens of legal ownership; and even admitting the soundness of the argument, it is perhaps a sufficient answer that to compel the trustee to retain the trust and yet give him no right of indemnity against the *cestui* is intolerably harsh. *Hardoon* v. *Belilios* has been regarded as an innovation. Yet it is undoubted law that where the trust was undertaken at the *cestui's* request the personal right against him exists. *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18. *Hobbs* v. *Wayet*, 36 Ch. D. 256. These cases have been explained on the ground of implied contract. But in the ordinary case the possibility of a liability beyond the value of the *res* is not in fact contemplated by either party. The true principle would seem to be that a *cestui* when he accepts the equitable title must be held to take upon himself the liabilities. See *Whittaker* v. *Kershaw*, 45 Ch. D. 320. Natural justice demands that the burdens should fall upon him who reaps the benefits.

PUBLICATION OF BERTILLON MEASUREMENTS AND PHOTOGRAPHS AS A BASIS FOR AN ACTION OF LIBEL. — The Bertillon system of measurements and photographs has become widely established for the discovery and identification of criminals. So far as the subjects are really suspicious characters, the system cannot be criticised; but occasionally it is used upon a perfectly innocent man who has been accused and acquitted of crime. A recent writer calls this situation a "crying evil," and argues that such a victim should recover in an action for libel against the sheriff. *Publication of Bertillon Measurements and Photographs of Prisoners, Innocent or Acquitted of the Crimes Charged against Them*, Anon., 57 Central L. J. 261 (Oct. 2, 1903). The article assumes that there is no trespass to the person or invasion of any right of privacy in taking the photographs. A writ of mandamus to compel the sheriff to destroy or surrender the data has been denied, because such destruction or surrender was not the sheriff's official duty. *In re Molineux*, 83 N. Y. Supp. 943. An injunction to restrain the sheriff from circulating the picture has been also refused on the ground that in the United States equity will not enjoin the publication of a libel. *Owen* v. *Partridge*, 82 N. Y. Supp. 248. With these decisions the article agrees, but insists that the sheriff should be liable in an action for libel for publishing the plaintiff's photograph in a connection which implies that he is at least to be suspected of crime.

The only case which has been found on the point refused recovery against the sheriff on his official bond, holding that the publication was not an official act. *Bruns* v. *Clausmeier*, 154 Ind. 599. The actual ground of this decision seems questionable, and the court avoided the important issue as to whether there was any actionable libel. To such an action truth would be a possible defence, but could be proved only in a minority of cases. Absolute privilege should be denied, since it is recognized in the United States only in very exceptional cases, and in the present instance there appears to be no clear demand for such extraordinary protection. On the other hand, conditional privilege would seem appropriate, for an efficient control of criminals apparently requires, for one thing, that the sheriff send descriptions of those whom he suspects to other public officers having a corresponding duty and interest. *Harrison* v. *Bush*, 5 E. & B. 334. Conditional privilege may, however, be lost in four ways. First, by exceeding the reasonable necessities of the occasion, either in the matter collected or in the manner of its use. But this fails in the present instance, since only regulation data are sent and in a regular way. Secondly, if the defendant acted with any motive except the proper one of duty. Thirdly, if he did not honestly believe the plaintiff to be a suspicious character. In the two latter cases there would seem to be no reason or policy in protecting the sheriff from liability. Fourthly, according to some authorities, his privilege is lost if his belief is not reasonable as well as honest. *Carpenter* v. *Bailey*, 53 N. H. 590. England and one or two of the United States are *contra*, but the question has not often been adjudicated. *Clark* v. *Molyneux*, 3 Q. B. D. 237. Probably each jurisdiction will apply a uniform rule to all cases of conditional privilege. The present case then merges into the general inquiry, whether the defendant is sufficiently protected in the exercise of his functions, if he may without liability damage the plaintiff by a falsehood so long as he acts reasonably and honestly; or whether it is wiser that in matters frequently of nice estimate the defendant should be free to exercise his discretion, so long as he acts honestly and with proper motive, without the restraint necessarily imposed by liability according to an external standard. On the whole the latter view seems more expedient, particularly in the large class of cases where privilege rests on official duty. Accordingly the sheriff should be liable in an action for libel only where he has acted with improper motive or without honest belief in the truth of the publication.

Fraudulent Alteration of Commercial Paper Negligently Drawn. — Few legal questions touch the business world more closely than those relating to commercial paper. Negotiable instruments have come to be used almost as if they were money, and their safe and ready circulation, therefore, is a matter of great importance. Since they are exposed to the dangers of fraudulent alteration even more than the ordinary currency of the country, it becomes desirable that every legal precaution should be taken to preserve them intact. Whether the law should aid in this matter by holding liable one who through his negligence has facilitated the alteration of commercial paper and thereby caused an innocent party loss, is an interesting question. The English law on the point has recently been reviewed by Mr. G. H. A. Montgomery. *Fraudulent Alteration and the Effect of Negligence*, 2 Can. L. Rev. 632 (Sept. 1903).

In the opinion of the author the English decisions establish two principles. First, as between drawer and acceptor, the former owes a duty so to draw as not to facilitate alteration, and he must answer to the latter for any loss resulting from failure to observe that duty. Secondly, as between the drawer or acceptor and subsequent parties there is no such duty, and, consequently, no liability for a failure to observe it. The first of these conclusions rests on a decision handed down seventy-five years ago. *Young* v. *Grote*, 4 Bing. 253. The case has never been overruled, but it is difficult to say whether it would be followed on the facts to-day. Recent utterances of English judges point decidedly the other way.

See *Union Credit Bank* v. *Mersey Docks and Harbor Board*, 1899, 2 Q. B. 205, 211, 214. The author's second statement depends on the authority of one subsequent case, and is probably correct, although the liability involved was that of an acceptor only, not of a drawer. *Scholfield* v. *Londesborough*, [1896] A. C. 514. In America the decisions are generally confined to cases of notes, and the courts are not agreed whether a negligent maker is liable to an innocent holder for value after alteration. A respectable line of decisions imposes such liability. *Hackett* v. *First Nat'l Bank of Louisville*, 70 S. W. Rep. 664. Some courts have, however, reached an opposite conclusion. *Greenfield Savings Bank* v. *Stowell*, 123 Mass. 196.

Whatever be the result of the cases, it would seem on principle that there could be no valid distinction such as that which the English courts have tried to lay down. The drawer of a bill, subsequently raised, can be liable to the acceptor only because of negligence. And if he has been negligent, his liability ought to extend to any innocent subsequent party injured by that misconduct. The drawer knows the instrument is likely to come into the hands of a holder in due course, and he ought to answer for negligence which facilitates alteration and causes the holder loss. The reasoning, moreover, which holds a maker or drawer, ought equally to apply to an acceptor. The latter does not, it is true, determine the original form of the instrument. He may, however, refuse to accept a bill negligently drawn, or, if this would give rise to inconvenience, he may strike his pen through the blank spaces that suggest and encourage alteration. See EWART, ESTOPPEL, 47. By his acceptance he assumes a primary liability on the bill, and ought to use reasonable care in dealing with it. To this standard drawer, maker, and acceptor alike should be held. It certainly is no more than reasonable care for one primarily liable on an instrument to see that it passes into circulation so drawn as not easily to be altered.

RES GESTAE. — This rather vague branch of the law forms the subject of a recent article by a well-known text-writer. *The Doctrine of Res Gestae in the Law of Evidence*, by Sidney L. Phipson, 19 L. Quart. Rev. 435 (Oct. 1903). In one important respect the author takes a position at variance with that of most of the authorities, and one which would seem to be erroneous. After examining the cases he decides that the *res gestae* principle does not properly cover the use of declarations as evidence of the truth of what they assert.

Mr. Phipson accurately divides the declarations, which are denominated *res gestae*, into two classes: (1) Those which *constitute* the transaction in issue, *e. g.* the words alleged as the basis of an action for slander; (2) Those which *accompany* and *explain* the transaction in issue. In the first class the declarations are of course not evidence at all, and so are not the subject of any doctrine of evidence. In the second class they are evidence, and as such may have value in one of two ways only: (a) as evidence of the facts they assert, *i. e.* testimonially; (b) as bases for inference as to the existence of other facts, independent of the truth or falsity of the declarations themselves, *i. e.* circumstantially. All relevant circumstances, including, of course, declarations, are admissible in evidence unless forbidden by some special rule of exclusion. Declarations falling under class (b) may, then, always go in, if only they shed light, either on the manner in which a transaction happened, or on the intention in the mind of an actor where that intention gives legal character to his otherwise equivocal act. And their admissibility does not depend on their being a part of and contemporaneous with the transaction which they explain. For example, on an indictment for homicide it is shown that a bystander shouted to the defendant that the deceased had a loaded pistol, the object being to prove, not that in fact the deceased did have the weapon, but that the defendant acted reasonably. It will hardly be contended that the same declaration would not be equally admissible for the purpose if made on the previous day. The doctrine of *res gestae*, then, is meaningless unless it applies to declarations under class (a), and Mr. Phip-

son's contention that it does not so apply would amount to denying the doctrine any proper place in the law.

On the other hand, the doctrine becomes perfectly rational if it be taken to apply to declarations used testimonially. The hearsay rule would forbid their use in this manner, but they are admitted because the circumstances render them more trustworthy than ordinary hearsay. The declarations must, however, be so close in time to the act as to be really a part of the transaction, *i. e.* they must have been made spontaneously, under the influence of the situation.

On this view, also, the variety of opinion, the existence of which Mr. Phipson points out, as to the admissibility as *res gestae* of utterances by other parties than the actors becomes explicable. Whether or not the force of a particular situation lends sufficient sanction to the words of those not directly concerned in it, is eminently a question for difference of opinion. But there could be no reason whatever for excluding such declarations, if they were to be used only circumstantially. The case supposed above will again serve as an illustration. It thus appears that not only is the doctrine of *res gestae* as laid down by the cases perfectly intelligible when applied to the use of declarations testimonially, but it would seem quite inapplicable to their use in any other way.

RIGHT TO COMPETE. — Mr. D. R. Chalmers-Hunt has added a valuable contribution to the discussion of the rights and liabilities of those engaged in business or labor competition. *Trade Unionism and Legislative Reform*, 11 J. of the Soc. of Comp. Legislation, N. s. (London) 161. The views of the author, very briefly stated, are as follows:

All liability in the law rests ultimately on principles of policy. In the discussion of questions of competition the difficulty arises out of the conflict of two great matters of policy. On the one hand, the State must preserve individual interests as far as possible, while, on the other, it must encourage business enterprise and competition. The problem is to strike a balance at the point most advantageous to the general welfare. The formula for determining this exact point, briefly stated, is, "The Nearer the Gain, the Better the Right." In other words, the legality of aggressive conduct must be determined by estimating its relation to an expected gain, not in the ratio of their respective quantities or amounts, but in the ratio of cause to effect. To gain sixpence in the course of business, A may inflict, if necessary to gain it, a loss of a million pounds upon B. But A may not inflict upon B a loss of sixpence merely in the hopes of gaining a million pounds. A must show, upon a reasonable hypothesis, an actual appreciable profit. In cases of great doubt, the proportion of damage to gain might be a convenient method of cutting the knot, but would not be an accurate application of this theory. In determining the proximity of the gain, the effect of the action in question must be calculated "objectively," the intention, purpose, or motive underlying the effort being unimportant. A practical application of this theory leads to certain general conclusions. (1) Competition is limited in time. The motive for toleration of any aggression ceases together with the cessation of the specific opposition in the market. (2) Competition must not extend beyond the limits of the actual market. (3) Vicarious attacks will not be allowed. An unauthorized person cannot commit acts of aggression on behalf of other persons, as, for instance, by a sympathetic strike. (4) The mere fact that it is necessary to strike at third persons to effectuate a competitive effort, does not make the aggression unlawful.

After developing his theory Mr. Chalmers-Hunt occupies some eighteen pages in analyzing the leading cases and in applying his principles to special facts. The writer also discusses such questions as "Picketing," "Fiduciary Relation," "Combination," and "Nuisance." Mr. Chalmers-Hunt is a recognized authority in this field, and is the author of a well-known work on "Trade Unions." To any investigator into the confused domain of the law of competition, the present article will prove invaluable.

LIABILITY ON JOINT AND SEVERAL CONTRACTS. — The principles of liability on joint and several contracts and the modifications of these principles by courts of equity and by the legislatures are expounded at some length in a recent article. *Liability of Parties Who Are at the Same Time both Jointly and Severally Liable Ex Contractu*, by Walter L. Chaney, 57 Central L. J. 283 (Oct. 9, 1903). Founded on the analogy of joint-tenancy, says Mr. Chaney, the law of joint and several contracts has developed to satisfy the increasing demands of industry, so that if a contract to-day expressly or by the implied intention and interests of the parties demands it, a liability is imposed on all the promisors together and on each separately. Statutes in some jurisdictions, he continues, have changed the general rule of the common law that all the promisees must join to enforce this liability, and that they must enforce it against either all the promisors together or against each separately. On the principle of *res adjudicata* the weight of authority holds that a joint judgment bars further action on the several contracts, and that individual judgments against the several promisors bar any joint action. Then follows an exposition of the special rules of discharge, liability of personal representatives, contribution, exoneration, subrogation, set-off, and bankruptcy. All partnership contracts, he says, are made joint and several by statutes in England and several of the states, and in others they are so considered in equity for the purpose of satisfying creditors. Finally, in fifteen or more states statutes have made joint contracts joint and several, and for the benefit of the promisees have removed many of the technicalities of the common law. As the authorities both old and recent are freely cited throughout the article, it should prove a useful supplement to previous expositions of the subject.

WATER OVERFLOWING FROM WATERCOURSES. — In certain portions of the United States the right of property owners to protect themselves against flood waters has become an important question, and one which has thrown the courts into considerable confusion. The conflicting decisions are collected and discussed in the current number of the American Law Review. *The Right of Landowners to Deflect upon the Lands of Others Waters Overflowing from Watercourses*, by J. L. Lockett, 37 Am. L. Rev. 713 (Sept.–Oct. 1903). The writer shows that a landowner may not interfere with a watercourse, but, by the so-called common law rule as opposed to the civil law rule, he may protect himself in a reasonable way from surface water, even to the damage of his neighbors. Following this distinction of fact, some jurisdictions hold flood waters of a river part of the watercourse and will not allow them to be deflected; others consider them surface water and allow the landowner to protect his land though the result will be increased damage to adjoining owners. Such conflicting decisions are inevitable, suggests Mr. Lockett, so long as courts attempt to bring flood waters regularly into one or the other of these classes. The true rule, he submits, is that of the courts of California, Louisiana, and Mississippi. Recognizing the unique nature of the overflow waters of our great rivers, these courts treat them as composing necessarily a third distinct class, and decide that a due regard to public interests demands that landowners shall in all cases be free to redeem their lands without liability to others. This frank treatment of conditions unknown to the old law agrees with the result reached by Missouri, Indiana, Washington, and Kansas, which hold the flood waters to be surface water, and apply the common law rule; but disagrees with both the result and the reasoning of the courts of Minnesota, Georgia, Nebraska, and Texas, which classify flood waters as watercourses.

FEDERAL INCORPORATION OF "TRUSTS." — A contributor to the American Law Review proposes a plan by which Congress can exercise effective control over the "Trusts" without the aid of a constitutional amendment. *Federal Control of Corporations*, by John Bell Sanborn, 37 Am. L. Rev. 703 (Sept.–

Oct., 1903). Upon the authority of the case of *McCulloch* v. *Maryland*, Mr. Sanborn concludes that Congress has the power to incorporate any company engaged in interstate commerce. The Supreme Court has extended the protection afforded by the interstate commerce clause well back into the process of manufacture. *Addyston Pipe and Steel Co.* v. *U. S.*, 175 U. S. 211. The present writer argues that, therefore, the power of Congress to incorporate must of necessity extend as far. So far as this power exists Congress could exercise it exclusively — prohibit corporations from engaging in interstate commerce except under charters granted by federal law, or accomplish the same result by taxing out of existence corporations owing their existence solely to state law. Upon the question as to how far federal corporations could engage in purely local business, Mr. Sanborn's views are not clearly stated. His position seems to be, however, that such corporations merely by virtue of their federal charter could engage in any local business incident to the carrying on of interstate commerce.

ACCORD AND SATISFACTION. *Ben Kendall.* Discussing only the payment of a lesser sum than the whole in satisfaction of a debt. 57 Central L. J. 244.

BASIS OF EMPLOYERS' LIABILITY FOR ACTS OF THEIR SERVANTS, THE. *A. Pearce Higgins.* Discussing the question by a comparison of the different systems of law. 11 J. of the Soc. of Comp. Legislation, N. S. (London) 109.

CHIEF JUSTICE MARSHALL AS A CONSTRUCTIVE STATESMAN. *Emlin McClain.* 1 Iowa J. of Hist. and Politics 427.

CLUB TRUSTEES' RIGHT TO INDEMNITY. *T. Cyprian Williams.* 19 L. Quart. Rev. 386. See *supra.*

COMPETENCY OF WITNESS APPEARING BEFORE GRAND JURY AS AFFECTING AN INDICTMENT RETURNED UPON SUCH EVIDENCE. *Anon.* 57 Central L. J. 281.

CONTRIBUTORY NEGLIGENCE AS AN OFFSET AGAINST FRAUD. 57 Central L. J. 303.

COURTS CHRISTIAN. *Geo. L. Holmested.* Discussing their origin, jurisdiction, and present position in the judicial system of Canada. 23 Can. L. J. 369.

DAMAGES BY FLOOD. *Francis A. Leach.* Discussing liability in cases where damage results from combined divine and human agencies. 57 Central L. J. 264.

DIVISIBILITY OF THE CONTRACT OF FIRE INSURANCE. *H. R. Bondies.* Discussing the question with especial reference to Texas law. 65 Albany L. J. 307.

DOCTRINE OF RES GESTAE IN THE LAW OF EVIDENCE. *Sidney L. Phipson.* 19 L. Quart. Rev. 435. See *supra.*

DUE PROCESS OF LAW. Part I. *Alton B. Parker.* Discussing the origin of the phrase and the decisions with regard to it. 37 Am. L. Rev. 641.

ENGLISH LAW REPORTING. *Frederick Pollock.* 37 Am. L. Rev. 684.

FEDERAL CONTROL OF CORPORATIONS. *John Bell Sanborn.* 37 Am. L. Rev. 703. See *supra.*

FRAUDULENT ALTERATION AND THE EFFECT OF NEGLIGENCE. *G. H. A. Montgomery.* 2 Can. L. Rev. 632. See *supra.*

GENERAL TAXATION IN ILLINOIS. *George A. Mason.* 36 Chic. Legal News 78.

HISTORY OF COMPARATIVE JURISPRUDENCE, THE. *Frederick Pollock.* 11 J. of the Soc. of Comp. Legislation, N. S. (London) 74.

INTEREST IN A MORTGAGE DECREE. *H. S. P.* Discussing the question with reference to The Transfer of Property Act. 5 Bombay L. Rep. 137.

LIABILITIES OF TRADE UNIONS AND THEIR MEMBERS. *A. C. Galt.* Discussing the liabilities of an unregistered trade union in Canada. 2 Can. L. Rev. 627.

LIABILITY OF PARTIES BOTH JOINTLY AND SEVERALLY BOUND EX CONTRACTU. *Walter L. Chaney.* 57 Central L. J. 283. See *supra.*

MARINE INSURANCE BILL, THE. *Arthur Cohen.* Criticising the proposed English Bill. 19 L. Quart. Rev. 367.

OLDEST CODE OF LAWS, THE. *F. W. Maitland.* Discussing lightly and briefly the recent discovery of an ancient Babylonian Code of Laws. 11 J. of the Soc. of Comp. Legislation, N. S. (London) 10.

PUBLICATION OF BERTILLON MEASUREMENTS AND PHOTOGRAPHS. *Anon.* 57 Central L. J. 261. See *supra.*

REMUNERATION OF TRUSTEES AND EXECUTORS. *Edward Manson.* Comparing the law in various jurisdictions. 11 J. of the Soc. of Comp. Legislation, N. S. (London) 185.

RIGHT OF AN ADULT CHILD TO RECOVER FOR SERVICES RENDERED TO A PARENT. *Colin P. Campbell.* 57 Central L. J. 323.

RIGHT OF PRIVACY, THE. *W. Archibald McClean.* 15 Green Bag 494.

SOME PECULIARITIES OF THE ADMIRALTY LAW. *John C. Walker.* 7 Law Notes (N. Y.) 128.

TRADE UNIONISM AND LEGISLATIVE REFORM. *D. R. Chalmers-Hunt.* 11 J. of the Soc. of Comp. Legislation, N. S. (London) 161. See *supra.*

VESTING OF STREETS IN LOCAL AUTHORITIES. *Anon.* Discussing question under English statutes. 67 Justice of the Peace 457, 470.

WATER OVERFLOWING FROM WATERCOURSES. *J. L. Lockett.* 37 Am. L. Rev. 713. See *supra.*

II. BOOK REVIEWS.

LITTLETON'S TENURES. In English. Edited by Eugene Wambaugh. Washington, D. C.: John Byrne & Co. 1903. pp. lxxxiv, 341.

This volume is a recent addition to the Legal Classic Series, which is a most excellent republication of some of the great classics of our early law. As the first distinctively common law writer whose works have been preserved, Thomas Littleton certainly deserves a prominent place in such a series. Though to-day his book has long since become obsolete for any use in modern legal practice, it is still of great value to a student of the history of the English land laws, and of the feudalistic life and society of the fifteenth century. At some time every lawyer ought to some extent at least to be such a student.

The editor has very wisely not attempted to present a revised or modernized translation from the original law French, but has adopted with few changes the translation used and approved by Lord Coke in his famous commentary. He has added, however, explanatory foot-notes, whenever they are required to throw light upon any obscure, doubtful, or mistranslated passage. This gives the reader the learning of the writer in clear-cut Anglo-Saxon, easily understood by almost any beginner and yet preserving the spirit and methods of thought of a century long passed. This edition should perform excellent service in rendering accessible to any reader a most important work that is too likely to be forgotten in these practical modern days, and in so doing it will be of real influence in the domain of legal history and education.

Perhaps the most interesting part of the book, however, is Professor Wambaugh's chatty little biography of Littleton, which forms the larger part of the introduction. Materials were often scanty, but he has made excellent use of those at hand, and has pieced them out by information as to life and customs in those days, obtained from other sources. This brief sketch makes the great writer seem much more human and real, so that, after reading the introduction, one approaches the Tenures with the feeling that he is studying not merely an ancient treatise on an obsolete system, but that he has before him the writings of a man who thought and worked, argued and decided cases in much the same way as lawyers and judges do to-day. In thus humanizing his subject, the editor has perhaps more than in any other way helped to bring Littleton's little book not only within the reach, but within the under-

standing of every student and lawyer of our time. The introduction also contains a complete and valuable bibliography of the printed editions of the Tenures. It is to be hoped that further volumes edited on the lines of the present one will soon be added to this series of classics. W. H. H.

HANDBOOK OF THE LAW OF PRINCIPAL AND AGENT. By Francis B. Tiffany. St. Paul: West Publishing Co. 1903. pp. xiii, 609. 8vo.

As the preface states strongly the author's indebtedness to certain predecessors who have composed treatises or have edited cases, it is obvious that this book makes slight claim to originality. This has excited some criticism, but, it would seem, unjustly, for the author, going far beyond quotation and paraphrase, gives occasional discussions of his own and adds references not found elsewhere. The chief defect is the omission of about half of the subject of Agency, namely, the topics often treated under the head of Master and Servant. The blame for this omission seems not to rest upon the author, for he explains that it is caused by the plan of the series to which this book belongs. It would be possible, doubtless, to divide the law of Agency into parts and to assign them among Contracts, Torts, Criminal Law, Evidence, Equity, and Persons; but such a distribution of the subject would disregard and conceal the very important truth that Agency is a consistent science composed of interdependent parts, and any departure from the treatment of the whole subject as one science — such, for example, as the consigning of parts to Torts, Negligence, or wherever else this series may place the omitted topics — differs from that most objectionable course in degree only, and not in kind. The author must, it seems, bear the burden of a few slips. Surely it is a mistake to fail to modify the statement (p. 21, n. 6) that "a partner cannot bind his firm by deed unless authorized under seal." Again there is a pitfall for students in the statement (p. 90), in bold type, that "a contract of agency which contemplates an illegal object is void"; for this statement, especially as the context is "What acts can be done by an agent," encourages the inference that acts performed under such an agency create no liability against the principal and in behalf of the third person, and a neighboring passage (p. 91) which may set the thoughtful reader on the right track is not so placed or expressed as to overcome the danger of error. Again, the statement and discussion (pp. 167–169) as to formal powers of attorney cannot be considered adequate, for *North River Bank* v. *Aymar*, though cited, is not discussed, and seems to be quite inconsistent with a natural understanding of the text. Still again, the discussion (pp. 199–201) of fictitious bills of lading and the like is not adequate. It would be easy to lengthen this list of shortcomings, but to do so would give the unjust impression that this book is frequently inaccurate. The truth is that many of the shortcomings are the mere slips found in any first edition, and many others are mere examples of the danger lurking in general statements.

THE INDEPENDENCE OF THE SOUTH AMERICAN REPUBLICS: A Study in Recognition and Foreign Policy. By Frederic L. Paxson. Philadelphia: Ferris & Leach. 1903. pp. 264. 8vo.

The author of this small book has taken in hand a difficult task; and that he has offered an interesting book as the result of his work is subject for congratulation. The work cannot, however, be praised, without adding several qualifications. The style is extremely involved at times, making a second and even a third reading of a sentence necessary to get the full bearing or meaning of an ordinary statement of fact. That which mars the book most seriously, however, is the almost entire lack of summaries. The need of these is apparent when one considers the arrangement of the book. In an introduction the author considers the cases presented for recognition during the wars of the

American Revolution and of the Revolutionary and Napoleonic Eras in France. The rest of the book is divided into three lengthy chapters, the first being a history of the South American Wars of Liberation; the second, an account of the South American policy of the United States; and the third, an account of British relations with South America. Though the events narrated in these chapters were happening contemporaneously, they are not sufficiently interwoven and connected in the book. The reader is asked to carry too much in mind, to do too much for himself. The full effect is lost by the failure to recapitulate and summarize. These faults, however, are faults of form rather than of substance. The author has done good service in collecting within a single volume so much that is of interest to the student of history, and so much that was hitherto scattered and inaccessible. The political side has been emphasized more than the legal. The discussion of the legal aspects of recognition is meagre and scattered. Here again the lack of summaries detracts from the value of the book to the lawyer. The table of contents is minute; but the addition of an index would have made the book more available for reference. It should be added that the work contains a considerable bibliography of the subject.

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by William Mack and Howard P. Nash. Vol. VII. New York: The American Law Book Company. London: Butterworth & Co., 1903. pp. 1139. 4to.

The contents of the seventh volume of this series commence with the concluding part of the discussion on "Chattel Mortgages," and embrace the first part of that on "Commercial Paper." The latter is by far the most important article, covering considerably more than half the volume. This is the work of Mr. Joseph F. Randolph, assisted by the editorial staff. Mr. Randolph is the author of "A Treatise on the Law of Commercial Paper," which is well known in this field of the law. His qualifications for the task assigned him are consequently apparent.

In a work of this sort, where the effort is not so much to explain the law as to set forth clearly and succinctly the state of the decisions, the difficulties are mainly those of selection and arrangement. The selection should be discriminating and yet exhaustive, the arrangement logical without sacrifice of convenience for reference. These tests the work in question satisfactorily meets, both in the text itself and also in the citations, which are not only ample but well selected and arranged. As a reference manual, which is all the book purports to be, it ought to prove of considerable service to the practitioner.

THE MASSACHUSETTS BUSINESS CORPORATION LAW OF 1903, covering private business corporations excepting financial, insurance, and public service corporations. By Prescott F. Hall. Boston: William J. Nagel. 1903. pp. lxii, 353. 8vo.

REPORTS AND RECORDS OF THE INDUSTRIAL ARBITRATION. New South Wales, 1903. Vol. II. Parts, 1, 2, 3, and 4. Edited by G. C. Addison. Sydney, N. S. W.: William Applegate Gullick. 1903. pp. viii, 1–104; viii, 105–200; viii, 201–296; viii, 297–392. 8vo.

REPORT OF THE SIXTH ANNUAL MEETING OF THE COLORADO BAR ASSOCIATION, held at Colorado Springs, Colorado, July 1 and 2, 1903. Denver, Col.: The W. T. Robinson Ptg. Co. 1903. pp. 194. 8vo.

THE CIVIL LAW IN AMERICA. Address by Charles F. Beach, Jr., at the St. Paul College of Law, Sept. 17, 1903. St. Paul: Pioneer Press. 1903. pp. 25. 8vo.

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THE MERGER CASE AND RESTRAINT OF TRADE.

AT least three distinct questions appear to be raised by the Northern Securities case:[1]

1. Do the facts disclose anything amounting to a misdemeanor under the Sherman Anti-Trust Act?[2]

2. If so, was the procedure appropriate?

3. If both the foregoing questions are to be answered in the affirmative, was the decree made by the United States Circuit Court the proper decree?

The second and third questions can be discussed with profit only by persons well acquainted with the equity practice of the federal courts; for although the jurisdiction exercised and the remedy applied in this case are wholly statutory, the statute must obviously be read in the light of the existing practice. The first question involves considerations (among others) of general common law on which it may not be presumptuous for an English lawyer, at the request of the Editor of the HARVARD LAW REVIEW, to say a few words.

At common law the fact that an agreement is void as being in restraint of trade does not, without more, make it unlawful — that is to say, an indictable offense or an actionable wrong — either to enter into such an agreement or, if one thinks fit, to observe it.

[1] United States *v.* Northern Securities Co., 120 Fed. Rep. 721.

[2] 26 Statutes at Large, c. 647, p. 209.

In England, at any rate, this was finally settled by the decision of the House of Lords in the Mogul Steamship Co.'s case.[1] But, by the Sherman Anti-Trust Act, it is a misdemeanor in the United States to make a contract (or otherwise combine or conspire) in restraint of trade or commerce among the several states.[2] I do not find any words making the execution of any such contract a substantive offense, though it might be held to be a "violation of this Act" within Section 4,[3] and therefore fit to be restrained under the special jurisdiction created by that section. The offense is in the nature of conspiracy, whether actually described as conspiracy or not. Execution is only an overt act which may be material as evidence.

The mere fact of one corporation owning a majority of the shares in one or more other corporations does not seem to have anything to do with the common law doctrine of restraint of trade. And the fact, if such it be, that this prevents competition does not appear to carry the matter further. A contract to buy out a competing business with its goodwill has never, in modern times, been treated as necessarily bad. In one sense, indeed, it is the object of every competitor to prevent competition, and he does so just so far as he succeeds. An undertaking by one corporation not to compete with another in any business including interstate commerce would, on the other hand, be an offense against the Act, subject to the question how far, if at all, the Act embodies by implication the exception of agreements which would be valid at

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[1] Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598.

[2] Section 1 declares that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[3] "SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

common law as being made for valuable consideration, and not going beyond the reasonable protection of the interest to be protected. But in this case no corporation has entered into any such undertaking.

The matter, however, is far from resting here. For it appears that the controlling corporation was created in fact, if not on the face of its charter, for the very purpose of acquiring control of the other two; that it was formed by members of those others, and that it has substantially no other members of its own. Corporations which are going to deal in affairs of that scale are not formed by casual meetings in the street or even in an office. I assume, therefore, that the Northern Securities Company was formed in pursuance of an agreement, and that all or most of the parties thereto were shareholders in the Northern Pacific or Great Northern railway. Was that agreement an agreement in restraint of trade?

An agreement between two or more firms to appoint a joint committee and conduct their business, wholly or in any material part, according to its directions, is in restraint of trade, and will not be enforced.[1] There seems to be no lack of recent American decisions to the same effect.

It obviously makes no difference in point of law whether the parties to such an agreement be natural persons acting singly, or groups of persons acting as firms, or corporations, or a mixture of all or some of these.

A corporation is a person distinct from its individual members. But it does not follow that the business of a trading corporation is not the business of its members. It is so much their business that they have, in many respects, rights analogous to those of partners, as we know from a long line of decisions in courts of equity. An agreement whereby one or more shareholders — not to say a majority of the shareholders — in a company renounce or fetter their rights of exercising an independent judgment in the company's affairs would seem, on the face of it, to be an agreement in restraint of trade.

This is not, in form, the present case. Here the shareholders in question agreed to transfer, and did transfer, their shares to the new company, and to take, as they did take, the consideration in its shares. They receive, or but for the decree under appeal would receive, dividends on these last-mentioned shares, and not

[1] Hilton *v.* Eckersley, 6 E. & B. 47.

on the railway shares which they have transferred. If the transaction were a real out-and-out sale, it is difficult to see what fault could be found with it on the point of restraint of trade, which alone concerns us. But has there been a genuine sale? Will the court not see any ground for going behind the form? The Northern Securities Company has, I understand, no property and no funds out of which to pay dividends other than the very railway shares which have been transferred to it; nor does it seek to distribute profits to any persons other than those transferors. And, if this is so, may it not be held that the transaction, as a sale, is merely colorable, and that in truth it is a device to the effect of enabling the transferors to retain their beneficial interest in the several railway companies while each of them renounces his individual voice and vote as a shareholder? And if that be the correct view of the facts, is not the agreement which leads to such results equivalent to an agreement between several persons engaged in business to surrender their discretion as to the manner in which they shall conduct their business? In other words, is it not an agreement in restraint of trade within the authority of Hilton *v.* Eckersley and the recent decision of the Supreme Court of the United States in the Addyston Pipe and Steel Co.'s case?[1]

In the event of an affirmative answer to the question last put, it still has to be considered whether the restraint imposed is a restraint on trade among the several states. This is a matter of specially American constitutional law, on which I do not venture to offer any opinion.

These, it is submitted, are some of the points of substance which the Supreme Court of the United States now has to determine. It would be interesting to know what view the courts of New Jersey would take, in properly constituted proceedings in the nature of *scire facias* or otherwise, of the validity of the charter granted to the Northern Securities Company; but nothing now before me shows whether any such question has arisen or is likely to arise.

As to the second section[2] of the Sherman Anti-Trust Act, its

[1] Addyston Pipe and Steel Co. *v.* U. S., 175 U. S. 211.

[2] "SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

words are very large, and I confess that I do not know what kinds of acts it was intended to include. Possibly it is aimed at such acts as those which were held in the Mogul Steamship Co.'s case not to be criminal or wrongful at common law. But I do not see, as at present advised, and on the materials before me, by what reasonable construction the facts of the present case can be brought within it.

I am not acquainted with the reasons given by the United States Circuit Court of Appeals in the present case, except as appears from the extracts in Mr. Thorndike's pamphlet.[1] Assuming his statement to be adequate, I submit, agreeing with him so far, that the decision cannot be supported on the grounds assigned. The line of argument above suggested is independent of those grounds.

Frederick Pollock.

R. M. S. ETRURIA, November, 1903.

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[1] The Decision in the Merger Case, by J. L. Thorndike. Boston: Little, Brown & Co.

This pamphlet, and the review of it by Professor Langdell in 17 HARV. L. REV. 41, suggested the present article. — ED.

THE LAW OF THE PUBLIC CALLINGS AS A SOLUTION OF THE TRUST PROBLEM.

THE distinction between the private callings — the rule — and the public callings — the exception — is the most consequential division in the law governing our business relations. In private businesses, one may sell or not as one pleases, manufacture what qualities one chooses, demand any price that can be gotten, and give any rebates that are advantageous. It is because the trusts are carrying on a predatory competition under the cover of this law that we have the trust problem. All this time in public businesses one must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances make no discriminations. If this law might be enforced against the trusts, it is believed that a solution of the problem would be found. In this time of peril to our industrial organization faith in our common law may show the way out. It cannot be that this law has guided our destinies from age to age through the countless dangers of society, only to fail us now.

I.

In Plantagenet England, as we see it through the medium of our earliest law reports, the mediæval system was breaking down and the modern organization springing up. Restriction of trade with some freedom left had been the old policy, freedom of commerce with some restriction was the new ideal. In the common law courts the judges were already enunciating the law of the new régime: with regard to private businesses they were saying that it lay in the election of the tradesman whether he would supply a customer or not, but with regard to the public callings that one was compelled to serve any one that tendered him ready payment. Great as was the change from the old economy to the new theory, it was not complete.

This distinction of the public callings from the private callings was often of the utmost importance. Whether a man was in a

common employment or not often made all the difference between the success of a writ or its failure. Primitive as the notions of legal liability were, the essential distinction between the obligations of those who were in public employment and the duties of those who were in private business was observed as one of the fundamental things in the legal system. And although many of these decisions are long since obsolete in one way or another, the subsequent changes in the general law in no manner affect the force of these decisions in establishing the nature of the distinction between the law of the public callings and the law of the private callings.

One such decision is an Anonymous suit in 1441.[1] This was a writ of trespass on the case against one R., a veterinary surgeon, to the effect that the defendant had undertaken to cure the plaintiff's horse with skill and care of a certain trouble, and that he then so negligently and carelessly gave medicines that the horse died. In the opinion of Paston may be seen the ground upon which the court proceeded: "You have not shown that he is a common surgeon to cure such horses, and therefore although he has killed your horse by his medicines, you shall have no action against him without an assumpsit." The court accordingly decided that a traverse of the assumpsit made a good issue. The significance of the special promise in those days was that when one man had authorized another to deal with property in the course of private business, the latter was under no legal liability to use care, unless he had made such a special promise. In the public businesses on the other hand the legal obligation to perform the act with proper skill was well established.

In England of the fifteenth century such professional men were few. This was in part due to the rudeness of the time, which made education unusual, and produced necromancers, not physicians. It was in part to be traced to the restrictions which the mediæval system had put upon the practice of the profession. At all events, in the common case only one surgeon would be at hand in any one district, so that if he should refuse to bleed the patient, all might be lost. Such being the situation, it is easy to understand why the law was so stern in the case of the common doctor who undertook to cure all who came, requiring him to act with care although he promised none, and giving the patient an action

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[1] Y. B. 19 H. VI. 49. 5.

although he had submitted himself to the operation, if the doctor was negligent. It was the unusual situation which produced this extraordinary law.[1]

Another instance is shown in an Anonymous note in 1450.[2] "Note that it was agreed by all the court that when a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case notwithstanding no act is done; for it does not sound in agreement. But where a carpenter makes a bargain to build me a house and does nothing, no action on the case, because that does sound in agreement." The meaning of this is that in those days no action lay upon a mere agreement, a promisor need not perform; but that one who undertook a public employment must perform, whether he agreed or not. Here again the common law obligation resting upon those in common calling to serve all that apply is the basis of the case.

Why is this entire distinction made between the wayside smith and the journeyman carpenter? Because again the economic conditions of these trades were so different. So far apart were they in the eyes of the courts, that the ordinary law was protection enough for those that dealt with the carpenter, while an extraordinary law was needed in behalf of those that came to the smith. There were builders enough to make the situation in that business virtual competition, so that there was no hardship; but the farriers were so scattered that the conditions were those of virtual monopoly, which required therefore a special code, else a good horse might be ruined for want of a shoe if the wayside smith should take it into his head to refuse to serve.[3]

Perhaps the most noteworthy of the common callings admitted by the early law was that of the innkeeper. In another Anonymous report in 1460[4] Moile, J., is quoted as saying: "If I come to an innkeeper to lodge with him, and he will not lodge me, I shall have on my case an action of trespass against him; and in the same way if I come to a victualler to buy victual, and he will not sell, I shall have an action of trespass on my case against him;

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[1] To the same effect are Y. B. 43 Ed. III. 6. 11; Y. B. 3 H. VI. 36. 33; 14 H. VII. Ras. Etn. 2. b. 1.

[2] Keilway 50. 4.

[3] To the same effect are Y. B. 21 H. VI. 55. 46; Y. B. 46 Ed. III. 19. 19; Y. B. 12 Ed. IV. 13. 9.

[4] Y. B. 39 H. VI. 18. 24.

and still in such cases if he will bring a writ of debt against me on such duty I shall have my law." This stands to the present day as the law of the land.

The innkeeper is in a common calling under severe penalty if he do not serve all that apply, while the ordinary shopkeeper is in a private calling free to refuse to sell if he is so minded. The surrounding circumstances must again explain the origin of this unusual law. When the weary traveller reaches the wayside inn in the gathering dusk, if the host turn him away what shall he do? Go on to the next inn? It is miles away, and the roads are infested with robbers. The traveller would be at the mercy of the innkeeper, who might practise upon him any extortion, for the guest would submit to anything almost, rather than be put out into the night. Truly a special law is required to meet this situation, for the traveller is so in the hands of the innkeeper that only an affirmative law can protect him. But the case of a customer in a town is altogether different. There are shops in plenty and he has time to choose. If he is charged an exorbitant price by one shopkeeper, all that he need do is to leave that shop and go to the next. No special law is required to meet this situation because, since the seller knows that the buyer may always do this, he in fact will almost never repulse him; rather he will by a low price induce him to purchase. The processes of competition may be trusted in the case of the shop, they do not act with any certainty in the case of the inn.[1]

A summary of this early law governing the public callings is to be found in one of the leading cases on carriers, Jackson *v.* Rogers[2] in 1683. "This was an action on the case, for that whereas defendant is a common carrier from London to Lymmington *et abinde retrorsum*, setting it forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them, though offered his hire. And held by Jefferies, C. J., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same. Note, that it was alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict." Indeed, that the common carrier is in public employment has never been doubted in the course of our law.

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[1] To the same effect are Y. B. 22 Ed. IV. 49. 15; Y. B. 10 H. VII. 8. 14.

[2] 2 Show. 237.

Again the explanation must be sought in the history of the times. In merry England the population lived in communities apart from each other, so that small attention was paid to the roads, which were no more than trails winding through the wilderness. No cart could pass over them, only pack animals, and so many were the bands of outlaws in the greenwood that no man might with safety traverse these paths alone, so that the transportation of goods was given over to the carrier, who travelled with oftentimes trains of pack animals and a considerable company. It was also the fact that one carrier or few would thus pass over the same roads between the same towns, because the traffic was still comparatively small, as England had not yet changed from a local economy where each community was sufficient to itself, into a national economy which would involve interchanges of goods between distant markets. The conditions surrounding transportation were therefore those of virtual monopoly. The merchant had therefore the protection of the law, a protection without which he stood no chance against oppression by the carrier.[1]

During the nineteenth century the common carrier has become of such consequence in the industrial organization, as the very condition of modern commerce, that the other public callings have been overshadowed and have been at times almost lost to sight; but in the fifteenth century barber and surgeon, smith and tailor, innkeeper and victualler, carrier and ferryman were of more or less equal concern to the law. That these callings were put into a class by themselves, that an unusual law was applied to them, that this was sternly enforced, and that it was elaborately worked out — all these things cannot be without their modern significance. The common law like its English king never dies, it persists from age to age, and though the instance of its rules may be seen to change as old conditions pass away and new conditions arise, its fundamental principles remain. The cases just under discussion are illustrations of the course of events. Barber, surgeon, smith, and tailor are no longer in common calling because the situation in the modern market does not call for it; but innkeeper, victualler, carrier, and ferryman are still in that classification, since even in modern trade the conditions require it.

The essential thing in all this is the recognition of the common

[1] To the same effect is Y. B. 22 Ass. 94. 41.

calling as a thing apart from the private calling, presenting different conditions, involving the necessity therefore of further law than that which suffices to regulate ordinary businesses. In these earliest examples there are certain elements in the situation which are so characteristic that the realization of them should lead to some conception of the nature of the public employment. It would be too much to expect to see the law settled in these times, to find modern aspects of the problem altogether anticipated; but it is not too much to hope to discover some meaning in the group of allied cases, some definition of the first principles involved. Upon the whole the circumstances surrounding these cases suggest this as the characterizing thing; that in the private calling the situation is that of virtual competition, while in the public calling the situation is that of virtual monopoly.

II.

The mediæval system with its basis of unfree trades did not pass away altogether; and the more modern society did not make all businesses free. Many and various franchises still confronted one in the country for many succeeding centuries, the remnants of the manorial system, — frankfold and park, warren and piscary, market and mill. In the towns, on the other hand, the craft gilds and the gilds merchant continued their privileges in the mystic fraternities and the trading companies, as the law reports bear evidence. These established institutions the courts tried to convince themselves were necessary for the proper regulation of those trades for all concerned therein.[1]

It was not, however, from choice that our courts dealt with legal monopolies. If they could have had their way in the early days, the ordinary trades would have been immediately opened to all, for the courts felt keenly the discrepancy between the general theories of their society and the occasional practices of their sovereigns. The great Case of Monopolies[2] shows an extraordinary prejudice against that famous patent of the crown which granted

[1] Examples of the restriction of competition under the manorial system may be seen in: Y. B. 3 Ed. III. 3; Y. B. 11 H. VI. 19; Fermor *v.* Brooke, Cro. Eliz. 203; Hix *v.* Gardner, 2 Bulst. 195; Fitzwaller's case, 3 Keeble 242; under the gild system, in: Davenant *v.* Hurdis, Moore 245; London case, 5 Co. 616; Wagoner's case, 8 Coke 121; Warmel *v.* London, 1 Strange 675; Gunmakers *v.* Fell, Willes 384; Rex *v.* Surgeons, 2 Burr 892.

[2] 9 Co. 84.

the sole making of cards within the realm to some favorites of her Majesty. So outraged was the court when this patent was pleaded that they were led to defy even a Tudor sovereign in the exercise of her undoubted prerogative.

Popham, Chief Justice, and the whole court resolved: "That it is a monopoly, and against the common law. All trades as well mechanical as others which prevent idleness (the bane of the commonwealth) and exercise men and youth in labor for the maintainance of themselves and their families, and for the increase of their substance to serve the Queen when occasion shall require are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is against the common law and the benefit and liberty of the subject. The second incident to a monopoly is that after the monopoly is granted, the commodity is not so good and merchantable as it was before; for the patentee having the sole trade regards only his private benefit, and not the commonwealth."

Splendid as was this judicial outburst, it was nevertheless so clearly against the law and the constitution that it furnished no precedent. Never since have the courts declared a franchise void when in point of law and constitution its case was perfect; for in such a case it is recognized now that the courts have no choice but to admit the condition of things created. In the interpretation of such grants, however, the courts have had an opportunity to declare their policy, and since the case of the Charles River Bridge[1] it has been recognized that competition is never to be excluded by implication, but only when it is forbidden by express stipulation. Such a rule of construction could not exist unless there were this cast in the mind of the courts.[2]

Of late years, however, another point of view has been taken which regards as valuable the creation of exclusive franchises as a method of dealing with the public service situation. This is shown in a modern definition of the nature of the franchise. In California *v.* Pacific Railroad[3] the State Board of Equalization of California included in the assessment of the Pacific Railroads which had been

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[1] 11 Pet. 420.

[2] Examples of the limitation of franchise may be seen in: Charles River Bridge *v.* Warren Bridge, *supra;* Horse Railway *v.* Cable Railway, 30 Fed. Rep. 388; Gas Co. *v.* Gas Co., 25 Conn. 19; Illinois Canal *v.* Chicago R. R., 14 Ill. 314; Turnpike Co. *v.* Railroad, 21 Vt. 895; Canal *v.* Va. R. R., 11 Leigh, 73.

[3] 127 U. S. 1.

chartered by Congress a large sum for the franchise. The constitutional question was thereupon raised whether it was possible for a state government to tax in this way an instrumentality of the federal government. In deciding this question the court was necessarily led to a determination of the nature of the modern franchise.

Mr. Justice Bradley said: "What is a franchise? Under English law Blackstone defines it as a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject. Generalized and divested of the special form which it assumes under a monarchial government based on feudal traditions, a franchise is a right, privilege, or power of a public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents, acting under such conditions and regulations as the government may impose in the public interest and for the public security. Such rights and powers must exist under every form of society."

Experience has shown that the truth of the matter is that the imposition of an occasional monopoly may be advantageous in the ordering of the industrial system. The policy of the grant of an exclusive franchise has appeared in various circumstances. More frequently than formerly this is the method taken by the modern state for dealing with the troublesome problem of the public utilities, for experience has shown that in the nature of the case many of the public works can be conducted with advantage only upon the basis of exclusive franchise. The telephone system is a conspicuous instance; for a single system of telephones can alone serve to satisfactorily bring together all the telephone users of a community. And in a less obvious case the waste by duplication of plants is so scandalous that the ultimate benefit to the community from giving an exclusive franchise, as to one gas company for example, must be admitted, when the futility of expecting any permanent competition has been so long exposed. Indeed it is now recognized by many advanced thinkers that it is necessary for the perpetuity of competitive conditions in general, that, in the particular instances of monopolistic conditions, the state should proceed to establish a legal monopoly, and then apply to that situation such strict regulation as the exigency demands.[1]

[1] Examples of franchises of this sort may be seen in: Binghamton Bridge, 3 Wall. 75, Sands *v.* River Improvement, 123 U. S. 288; Boston, etc., R. R. *v.* Salem, etc., R. R., 2 Gray 1; St. Louis St. Ry. *v.* Northwestern St. Ry., 69 Mo. 65.

The leading case upon legal monopoly without doubt is Allnutt *v.* Inglis.[1] The question that arose there was whether the London Dock Company had a right to insist upon an arbitrary hire for receiving wines into its warehouses, or whether they were bound to receive them there for a reasonable reward only. It appeared that by virtue of the Warehousing Act the existing state of things in the port of London was that that company alone had the legal privilege of taking goods in bond.

Lord Ellenborough said in part: "There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms. Here then the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose."

According to this case legal monopoly has its correlative legal obligation; that is, the acceptance of an exclusive right involves a continuous duty to serve all that apply. This solution is in reality the logic of the situation. If by force of his franchise the holder could refuse facilities to all the world, the position of things would be intolerable. The law of this case is the escape from that contingency. It does not deny that the monopoly exists to its full extent, but it puts upon the monopolist the limitation that he may charge reasonable prices only. It is in this way that in modern times the crisis is avoided.[2]

One of the earlier instances of this rule in the United States is to be found in Shepard *v.* Milwaukee Gas Light Company.[3] The plaintiff complained of the refusal of the established gas works to supply him. The defendant claimed that under the circumstances of the case it was not bound to serve the plaintiff. Mr. Justice Smith held that the gas company was bound to sell its gas to every citizen of Milwaukee upon compliance with such regulations only as the company might rightfully impose.

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[1] 12 East 527.

[2] The following cases may well be compared with the case mentioned in the text: Davis *v.* State, 68 Ala. 58; Dock Co. *v.* Garrity, 115 Ill. 155; Nash *v.* Paige, 80 Ky. 539; Ryan *v.* Terminal Co., 102 Tenn. 119; Barrington *v.* Dock Co., 15 Wash. 175.

[3] 6 Wis. 539.

His argument was this: "It is sufficient for the purposes of this case to know that the company had the exclusive right to manufacture and sell gas, and that hence the only means of supply available to citizens was through the agency of the company. Corporations of this kind are not like trading or manufacturing corporations whose productions may be transported from market to market throughout the world. Its manufacture depends upon the consumption of the immediate neighborhood for its profit and success, and upon no other place. From the nature of the article, the objects of the company, their relations to the community, and from all the considerations before mentioned, it is to me apparent that the company is not at all analogous to an ordinary manufacturing or trading corporation."

In the modern theory under discussion the creation of an exclusive franchise is indefensible unless the public convenience is thereby increased. In a case such as this of the gas company, the applicant would have to accede to whatever demands the company might make, or go without any supply, did not the law step in and command the company to supply him upon reasonable conditions. Whenever therefore such an exclusive franchise appears, the courts are prompt to put the company into the class of public servants, requiring it to serve the public in exchange for the privilege granted it by the people.[1]

Weymouth *v.* Penobscot Log Driving Company,[2] a case outside the beaten track, shows that the doctrine of public calling will be extended to any case in which the decisive circumstance of legal monopoly is shown. This was an action by a lumberman who had hauled his logs to various landings on the west branch of the Penobscot River where he had notified the company that they were located, brought against the log driving company because those in charge of the drive had carelessly left the logs behind so that they did not come to market that year. The company requested the court to instruct the jury that the corporation was not under any legal obligation to drive the logs upon request.

Mr. Justice Danforth held that the instruction was properly refused under the circumstances. "In this case the charter con-

[1] This same situation may be seen in *In re* Pryor, 55 Kans. 730; Lumbard *v.* Stearns, 4 Cush. 60; Gas Co. *v.* Calliday, 25 Md. 1; Wood *v.* Auburn, 87 Me. 287; Griffin *v.* Water Co., 122 N. C. 206; Cincinnati R. R. *v.* Bowling Green, 57 Oh. St. 366.

[2] 71 Me. 29.

ferred the privilege of driving, not a part, not such a portion as the company might choose, but 'all' the logs to be driven. This right having been accepted by the company, it became a vested and also an exclusive right. It is therefore taken not only from all other corporations, but excludes the owner as well. By its acceptance and exclusion of the owner from the privilege, in justice and in law it assumed an obligation corresponding to and commensurate with its privilege. It accepted the right to drive *all* the logs, and that acceptance was an undertaking to drive them *all*, or to use reasonable skill and diligence to accomplish that object."

Upon the whole this case better than most shows the impossibility of any other decision in cases like this of legal monopoly. Formerly the river was open to every one for the purpose of floating his logs to market; now it was closed to every one. A lumberman whom the company refused to serve would therefore have no alternative, since to drag his logs overland to market would not be a commercial possibility. No reasonable system of law would leave without relief a man confronted with such a situation. If any rule in our law is dictated by natural justice, this one would seem to be.[1]

III.

Wherever virtual monopoly is found the situation demands this law that all who apply shall be served, with adequate facilities, for reasonable compensation and without discrimination; otherwise in crucial instances of oppression, inconvenience, extortion and injustice there will be no legal remedies for these industrial wrongs. This is as true where the origin of this condition of monopoly is in natural limitations as where the establishment of it is by fiat of the state. Actual monopoly should be dealt with upon the same basis as legal monopoly; and indeed is so treated by the inclusion of both within the law of public employments.

No one can study the authorities upon this subject without feeling that we are just now entering upon an important development of the common law. It is at the present time difficult to predict what branches of industry will eventually be held of such public consequence as to be included in the category of public callings,

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[1] A few such cases, selected at random, are: Price *v.* Riverside Co , 56 Cal. 431; Wright *v.* Platte Co., 27 Col. 322; Hockett *v.* State, 105 Ind. 250; Mann *v.* Log Co., 46 Mich. 38; People *v.* New York, etc., R. R., 28 Hun 543.

because in the last few years the field has extended so widely before our very eyes. However we now have so much material for analogy and comparison that it ought to be possible to advance, in a tentative way at least, a series of tests that may indicate in a general way whether or not a business has attained such control of its market as to become of the class of public employments.

One of the earliest needs of a community is a supply of water for domestic uses; and it has been always obvious that this is a public utility in a true sense of that term. Accordingly it was conceded from the first that the situation demanded a coercive law; but the extent to which that law took the disposition of the business out of the discretion of the corporations which provided the supply was not appreciated. Hangen *v.* Albina Water Company[1] is a late illustration. The defendant company laid a main through Tillamook Street upon which the applicant lived; but the defendant from the first refused to supply water to persons living between the east line of the township and Fourteenth Street, within which limits the plaintiff resided.

Mr. Justice Lord said in part: "It must be conceded that the defendant is engaged in a business of a public and not of a private nature, like that of ordinary corporations engaged in the manufacture of articles for sale, and that the right to dig up the streets and place therein pipes or mains for the purpose of conducting water for the supply of the city and its inhabitants, according to the express purpose of its incorporation and the business in which it is engaged, is a franchise, the exercise of which could only be granted by the state, or the municipality acting under legislative authority. In such case, how can the defendant, upon the tender of the proper compensation, refuse to supply water without distinction to one and all whose property abuts upon the street in which its pipes are laid? If the supplying of a city or town with water is not a public purpose, it is difficult to conceive of any enterprise intrusted to a private corporation that could be classed under that head."

Various elements combine to make the business of supplying water to a community a public calling. Perhaps the chief of these is the natural limitation of the sources which makes the interposition of the state in aid of the enterprise necessary. The method of distribution through pipes requires the permission of the local

[1] 21 Ore. 411.

authorities in order to lay the pipes in the public streets. All this makes competition with the established company improbable, if, indeed, it does not make it impossible. At all events, monopoly in this service is so founded in the nature of things that competition there is all but unknown.[1]

When the first works were constructed to furnish gas through mains laid in the public streets to various householders in the community at large, new conditions in the supply of illumination were created. Before that time illuminants had been commodities, bought and sold in packages, purchasable at various shops scattered over every city. The keepers of these shops had never been compelled to sell to all that required of them; why then, it was asked, must gas companies be compelled to do so? At first such doubts had some currency with the courts, but at the present time there is a general agreement that mandamus should issue to compel a recalcitrant company to supply an aggrieved applicant.

Portland Gas Company *v.* State[2] is an important case on this point. The particular issue was whether a gas company could refuse an applicant upon the ground that he was then being served by another gas company. The fundamental character of this problem is apparent.

In granting the mandamus Mr. Justice Coffey said: "Gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets, whose fee is held by the municipal corporation in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain. Accordingly, a gas company is bound to supply gas to premises with which its pipes are connected. It has often been held that mandamus is the proper proceeding by which to compel a gas company to furnish gas to those entitled to receive it. In view of these authorities, we are constrained to hold that a natural gas company, occupying the streets of a town or city with its mains, owes it as a duty to furnish those who own

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[1] The following cases, among others, hold the water companies to be in public calling: Spring Valley Works *v.* Shoutes, 110 U. S. 347; Smith *v.* Water Works, 104 Ala. 315; Water Co. *v.* Fergus, 178 Ill. 571; Shiras *v.* Ewing, 48 Kans. 170; Water Co. *v.* Adams, 84 Me. 472; Turner *v.* Water Co., 171 Mass. 336; McDaniel *v.* Water Works, 48 Mo. 273; American Water Works *v.* State, 46 Neb. 1194; Olmstead *v.* Morris Aqueduct, 47 N. J. Law 335; Silkman *v.* Water Comm'rs, 152 N. Y. 327; Griffin *v.* Goldsboro Water Co., 112 N. C. 206; Brymer *v.* Buller Water Co., 179 Pa. St. 231; Watauga Water Co. *v.* Wolfe, 99 Tenn. 429.

[2] 135 Ind. 54.

or occupy the houses abutting on such street, where such owners or occupiers make the necessary arrangements to receive it and comply with the reasonable regulations of such company, such gas as they may require, and that, where it refuses or neglects to perform such duty, it may be compelled to do so by writ of mandamus."

What, after all, is that element in the situation which differentiates the vending of candles from the purveying of gas? Is it not this, — that the box of candles may be sent from any factory into any market, a condition which preserves virtual competition in the sale of candles; while a thousand feet of gas can only be got by the consumer from the local gas company, a situation which presents an inevitable monopoly in the supplying of gas. It is in that sense that the monopoly of the local company is natural, and it is for that reason that it is permanent. Experience confirms this statement, that seldom in any community will competitive conditions prevail in the supply of gas, and never are these conditions lasting. This consideration must be at the basis of the universal holding at the present day that the business of gas making is one of the public services.[1]

The best discussion of the nature of public calling is to be found in the cases concerning the telephone. These again are most of them common law decisions, so that they disclose the essential tests by which public calling is established. One of the best of these cases, because of its full working out of the problems, is State *v.* Citizens' Telephone Company.[2] It appeared in this case that one Gwynn had a grocery, in which was a telephone of the Citizens' Telephone Company. Later he bought a market next door and cut a door through the wall, and in this market there was a telephone of the Southern Bell Telephone Company. The Citizens' Company thereupon refused to have any dealings with Gwynn unless he should agree to use their system exclusively in both stores. A mandamus was confirmed to Gwynn as relator against the Citizens' Company by Mr. Justice McIver, entitling

[1] The following decisions among others hold the gas companies to be in public calling: Montreal Gas Co. *v.* Cadreux [1899], A. C. 589; Gibbs *v.* Gas Co., 130 U. S. 396; Smith *v.* Gas Co., 132 Cal. 309; Coy *v.* Gas Co., 146 Ind. 655; *In re* Pryor, 55 Kans. 730; Louisville Gas Co. *v.* Drelaney, 100 Ky. 408; Gas Co. *v.* Calliday, 25 Md. 1; Williams *v.* Gas. Co., 52 Mich. 599; People *v* Manhattan Gas Co., 45 Barb. 136; Lanesville *v.* Gas Co., 47 Oh St. 1; Bailey *v.* Fayette Gas. Co., 193 Pa. St. 175; Hotel Co. *v.* Gas Light Co., 3 Wash. 316; Shepard *v.* Milwaukee Gas Co., 6 Wis. 539.

[2] 61 S. C. 83.

him to have a telephone notwithstanding that he still refused to enter into an exclusive agreement, because the enforcement by the company of such a condition was contrary to its public duty. In the words of the court: "The undisputed facts are that the respondent, in the exercise of its franchise conferred by its charter, had established a telephone business in the city of Spartanburg, and had erected its poles and strung its wires in and along the streets of said city, and thus had become, at least, a *quasi* common carrier of news, and as such was under an obligation to serve all alike who applied to it within reasonable limitations, without any discrimination whatsoever. When, therefore, the relator applied to the respondent to replace the telephone instruments in his grocery store and in his residence, from whence they had been removed by the defendant company but a few days before, the respondent was, in our opinion, bound to comply with such demand, under the obligations to the public which it had assumed. The reason given for its refusal — that the relator refused to agree that he would use respondent's telephone system exclusively — was not sufficient to relieve it from its obligation to serve the public, of which the relator was one, without any discrimination whatsoever." In the case of the telephone identical services must be provided to make competition possible; for it is not enough to get new takers into a new system, the old ones must be gotten in to satisfy the new ones.

From an economic point of view the duplication of plant that is necessary to make competition possible in these public utilities is sheer waste, without compensating advantages. From a business point of view this fact is a most effective deterrent. When one of these public services is established in a neighborhood, it is infrequent that men will be found to invest their money in the construction of another plant. The risk of loss in such a case is too great, for since the market for both old and new is limited to the locality, the struggle must of necessity be so desperate that neither can expect to escape serious injury. Moreover, since most of such public works are permanent in their construction, if the venture fails of success an attempt to remove them would result in almost total loss.[1]

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[1] The following decisions among others hold the telephone companies to be in public calling: State *v.* Telephone Co., 23 Fed. Rep. 539; Hockett *v.* State, 105 Ind. 250; Telephone Co. *v.* Talley, 118 Ind. 194; State *v.* Telephone Co., 17 Neb. 126; People *v.* Hudson Telephone Co., 19 Abb. N. C. 466; State *v.* Telephone Co., 36 Oh. St. 296;

In the present generation a new method of illumination by electricity was devised which involved distribution from a central plant by a system of wires radiating through the localities served. The essential features of the electric business are so like the main conditions in the gas business, it was obvious that the same law of public service was to be enforced in this instance. Indeed, it is most significant that no electric light company has ever squarely denied that there rested upon it the primary obligation to serve all.

All this is most significant; for it shows that the law of public service has now such general acceptation that in any new instance that is obvious it will be applied by the courts without hesitation. The latest case is Snell *v.* Clinton Electric Light Company,[1] where the company refused to furnish electric light to the applicant until he paid the cost of the transformer. The real reason for the refusal was a business policy of the company to increase their operations by charging applicants for transformers unless the wiring of the house was done by the company itself. In the present case the wiring was done by outside parties, but the jury found that the residence was properly wired.

In holding for the consumer Mr. Justice Carter stated the fundamental propositions involved in this way: "There is no statute regulating the manner under which electric light companies shall do business in this state. They are therefore subject only to the common law, and such regulations as may be imposed by the municipality which grants them privileges. Appellee, being organized to do a business affected with a public interest, must treat all customers fairly and without unjust discrimination. Both reason and authority deny to a corporation clothed with such rights and powers and bearing such a relation to the public the power to arbitrarily fix the price at which it will furnish light to those who desire to use it. The company was bound to serve all its patrons alike, it could impose on the plaintiff in error no greater charge than it exacted of others." It is noticeable that in this opinion only one of the cases cited is that of an electric light company; the other examples cited involve gas and water, telephone and telegraph, proof positive that in the mind of the court these all fall within one department of the law.

Telephone Co. *v.* Com., 3 Atl. Rep. 825; Gardner *v.* Telephone Co., 23 R. I. 312; Telephone Co. *v.* Telephone Co., 61 Vt. 241.

[1] 196 Ill. 626.

In this business of electric lighting one element in the conditions which produce monopoly is prominent, — the absence of the substitute; that is, the cost to the consumer of shifting for himself if he is refused. No electricity at all can be produced by the smaller consumers without the installation of apparatus of considerable cost, operated thereafter at large expense. Moreover, this is a business where when the units are smaller the cost of production is greater by a surprising ratio, so that in ordinary conditions none of the larger consumers would go to supplying them unless the rates of the company were unreasonable. This state of affairs would put the patron at the mercy of the company, unless the law interposed and compelled the rendition of service upon a reasonable basis.[1]

These four examples are enough perhaps to show the general nature of the conditions which characterize public calling. In the case of each illustration emphasis was placed upon one or the other of these elements; while the truth of the matter is that most of them exist in all. Thus in the usual public calling some natural limitation of some sort will be discovered, some control of the market from the character of the product; the cost of the duplication of the plant will be great, and the substitute will cost more than the original. These are the conditions that deter competition and foster monopoly.

The positive law of the public calling is the only protection that the public have in a situation such as this, where there is no competition among the sellers to operate in its favor. So much has our law been permeated with the theory of *laissez faire*, which was but lately so prominent in the policy of our state, that the admission has been made with much hesitation that state control is ever necessary. But the modern conclusion, after some bitter experience, is that freedom can be allowed only where conditions of virtual competition prevail, for in conditions of virtual monopoly, without stern restrictions, there is always great mischief. There is now fortunately almost general assent to state control of the public service companies, since it is recognized that that special situation requires a special law. That law is based upon the conclusion that it is no inconsistency for the State to leave the generality of busi-

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[1] The following decisions among others hold the electric companies to be in public calling: Andrews *v.* Electric Light Co., 53 N. Y. Supp. 810; Cincinnati R. R. *v.* Bowling Green, 57 Oh. St. 336.

ness free from restrictions, while controlling with a strict code such lines of industry as are affected with a public interest.

The working out of this detailed law governing public calling is now going on so rapidly that it already is of real value in grappling with actual abuses, such as exclusive demands, inadequate facilities, hidden overcharges, and undue discriminations. At the same time, as will be seen, new businesses are being put into the class of public employments, so that a greater variety of industries are now within the law. It seems only a question of time when the question will be raised for determination whether these great industrial trusts are public service companies. If ever a decision shall put them into that classification, it is submitted that the law of public services will be found to have developed far enough to meet the exigencies raised by the complexity of their operations.

Bruce Wyman.

SPECIFIC PERFORMANCE FOR AND AGAINST STRANGERS TO THE CONTRACT.

GIVEN a contract which, from its nature, warrants a decree for its specific performance by the promisor at the suit of the promisee, under what circumstances may its performance be compelled either by persons other than the promisee, or against persons other than the promisor?

The typical agreement justifying the relief of specific performance is the agreement for the sale and purchase of land. It is often said that such an agreement makes the seller a trustee for the buyer. But the relation between these parties is quite different from the ordinary trust relation. The seller retains the legal title as a security for the payment of the purchase-money. Subject to this incumbrance and to the reservation of rents and profits up to the time fixed for conveyance, in case the seller keeps possession also, the equitable interest is in the buyer. In other words the real relation of the buyer and seller is analogous to that of a mortgagor and mortgagee in a mortgage created, as in the modern English practice, by an absolute conveyance on the part of the mortgagor, and an agreement to reconvey, on payment of the loan, on the part of the mortgagee. The reports are full of statements to this effect.[1] One of the most pointed is Judge Turley's remark in Graham *v.* McCampbell:[2] "We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of a debt and a legal title retained to secure the payment of a debt." It goes without saying that a mortgagor, or his assignee, may redeem the land and compel a reconveyance from any grantee of the mortgagee, unless the title has vested in a purchaser for value without notice of the mortgage, and that any assignee of the mortgagor has the same right. In like manner the buyer or any assignee, immediate or remote, of the buyer's rights may redeem the land and compel a conveyance from the seller, or from any assignee of the land, except a purchaser for value without notice of the vendor's promise, or one claiming under such a purchaser.

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[1] See 1 Ames, Cas. in Eq. Jur. 240 *n.*

[2] Meigs, 52, 55.

The soundness of the analogy to the mortgage is the more evident, if one considers the right to compel performance of the buyer's promise. As the mortgagee, or his assignee, may maintain a bill against the mortgagor for the payment of the mortgage debt, or for the alternative relief of foreclosure of the mortgage, and a decree for the payment of any deficiency between the debt and the value of the land, so the vendor, or his assignee, may maintain a bill against the buyer for the payment of the purchase money, or for the alternative relief of foreclosure of the buyer's equity and a decree for the payment of any deficiency between the contract price and the value of the land.[1] Similarly, as no decree will be given against an assignee of the mortgagor for the payment of the whole or any part of the mortgage debt, so no decree can be had against the assignee of the buyer for the whole or any part of the purchase money. The sole remedy against an assignee of the mortgagor is the foreclosure of the mortgage, and the sole remedy against an assignee of the buyer is the foreclosure of his equity to call for a conveyance.[2]

If it be asked why the assignee of the mortgagee or vendor must convey, although he has made no promise to convey, while the assignee of the mortgagor or buyer need not pay, because he has made no promise to pay, the answer is simple. The assignee of the mortgagee or seller, having notice of his grantor's agreement to convey, would naturally pay him only the value of the incumbrance. If he were permitted to repudiate his grantor's agreement he would retain for himself a *res*, which, obviously, should go to the mortgagor or buyer upon payment of the incumbrance. To prevent this unconscionable enrichment of one person at the expense of another, equity, upon the plainest principles of justice, imposes upon the assignee a constructive duty to convey, coextensive with the express undertaking of his grantor.

But this reasoning is wholly inapplicable to the assignee of the mortgagor or buyer. He receives no *res* which should go to the mortgagee or seller, and he makes no unjust benefit at their expense by not paying the mortgage debt or purchase money.

Besides the agreement to transfer property there are some other affirmative agreements touching a particular *res*, of which equity will compel specific performance. A grantor, for instance, may

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[1] Lysaght *v.* Edwards, 2 Ch. D. 499, 506, per Jessel, M. R.

[2] Comstock *v.* Hitt, 37 Ill. 542 and cases cited in 1 Ames, Cas. Eq. Jur. 141, *n.* 2.

require the grantee of land to build thereon, in fulfilment of his promise given as a part of the consideration for the conveyance.[1] But the rights and duties of third persons, growing out of such a promise are widely different from those of assignees of promisors in promises to convey property. The promise to build being made, as a rule, to the promisee, not as an individual, but as an occupant of land in the neighborhood, the benefit of the promise is not transferable generally to such person as the promisee may designate, but only to some subsequent occupant of the promisee's land.[2] Nor is the burden of such a promise transferable to any one, even to a purchaser from the promisor with notice of the promise.[3]

Such purchaser, by refusing to build, does not retain for himself any *res* which ought to go to the promisee. His only benefit is the avoidance of a possibly unprofitable expenditure of money. Nor does this benefit to him imply an unjust pecuniary loss to the promisee. For the latter still has his right to compensation for the promisor's breach of contract. If the promisor is solvent, the promisee will lose nothing; and even if the promisor is insolvent, the promisee's loss, like that of the other creditors, is simply the consequence of misplaced confidence in the pecuniary ability of the common debtor. Moreover, it is precisely the same loss that would have befallen him if the promisor had kept the land. So long as this is true, there is obviously no reason why equity should impose upon the promisor's assignee the constructive duty of fulfilling the latter's promise, and thereby shift the loss from the promisee, who willingly took the risk of the promisor's solvency, to the assignee, who gave no credit.

If we turn now to negative agreements restricting the use of property, we shall find that the cases in which equity will grant

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[1] Storer *v.* Gt. West. Co., 2 Y. & C. C. C. 48; Mayor *v.* Emmons, [1901] 1 K. B. 515, and cases cited in 1 Ames, Cas. Eq. Jur. 78, *n.* 1.

[2] Doubtless in some cases the benefit of the promise is not assignable at all, being intended to enure to the advantage of the promisee alone or to the good of the public. Austenberry *v.* Corporation, 29 Ch. Div. 750.

[3] Haywood *v.* Brunswick Society, 8 Q. B. Div. 403; London Co. *v.* Gomm, 20 Ch. Div. 562, 583 (*semble*); Andrew *v.* Aitken, 22 Ch. D. 218 (*semble*); Austenberry *v.* Corporation, 29 Ch. Div. 750 (overruling Cooke *v.* Chilcott, 3 Ch. D. 694 (invalidating Holmes *v.* Buckley, 1 Eq. Ab. 27, and explaining Morland *v.* Cook, 6 Eq. 252); Hall *v.* Ewin, 37 Ch. Div. 74; Clegg *v.* Hands, 44 Ch. D. 503, 519.

But see Gilmer *v.* Mobile Co., 79 Ala. 569; Whittenton *v.* Staples, 164 Mass. 319; Countryman *v.* Deck, 13 Abb. N. C. 110; R. R. Co. *v.* R. R. Co., 171 Pa. 284; Lydick *v.* Baltimore Co., 17 W. Va. 427.

its relief by specific performance in favor of or against strangers to the contract, fall into two classes. The first includes covenants that run at law with the land or the reversion, in which cases the equitable relief is concurrent with the legal remedy. The second includes agreements, whether under seal or by parol, enforceable at law only by and against the immediate parties, in which cases, therefore, the jurisdiction of equity in favor of or against third persons is exclusive.

The rule as to the first class of cases is simple and uniformly recognized. If, from the nature of the covenant, the covenantee has the option of proceeding at law for damages or in equity for specific performance by means of an injunction, this same option may be exercised by any third person entitled to sue, and against any third person liable to be sued at common law.[1]

In the second class of cases there is not complete harmony in the decisions; nor in the courts, which agree in their decisions, is there a consensus of opinion as to the *ratio decidendi*. It will be convenient first to state the result of these decisions as to the persons subject to the burden of these agreements; as to the persons entitled to the benefit of them; as to the nature of the restrictions, of which the benefit and the burden pass to third persons; and as to the kind of *res*, to which such restrictions attach; and then to discuss the general principle to be deduced from the decisions.

To maintain a common law action upon covenants running with the land at law privity of estate between the covenantor and the defendant, is essential. But no such privity is necessary in suits against persons chargeable only in equity. The burden of the restrictive agreement, unless expressly limited to the covenantor,[2] falls upon every possessor of the *res* except a purchaser for value without notice of the agreement, or a possessor subsequent to such *bona fide* purchaser. Accordingly relief by injunction will be granted not only against the covenantor's assignee,[3] but against his lessee,[4] against an occupant,[5] and also, it is believed, although no case in point has been found, against a disseisor.

A purchaser for value without notice of the agreement takes the

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[1] Clegg *v.* Hands, 44 Ch. Div. 503.

[2] *Re* Fawcett, 42 Ch. D. 150.

[3] Tulk *v.* Moxhay, 2 Ph. 774, and cases cited in 1 Ames, Cas. Eq. Jur. 149, *n.* 1.

[4] John Brothers Co. *v.* Holmes, [1900] 1 Ch. 188; Holloway *v.* Hill, [1902] 2 Ch. 612, and cases cited in 1 Ames, Cas. Eq. Jur. 152, *n.* 1.

[5] Mander *v.* Falcke, [1891] 2 Ch. 554.

res free from the restrictive agreement.[1] The promisee and the innocent purchaser are equally meritorious persons, and one of them must suffer by the wrongful conduct of the transferor. But in this instance, as in other cases of equal equities, the court leaves the parties where it finds them. To incumber the *res* in the hands of the innocent purchaser for the benefit of the promisee would be to rob Peter to pay Paul. The situation is altogether different, if the *res* is acquired with notice of the restrictive agreement, or by a volunteer. If such a possessor were permitted to ignore the restrictive agreement, he would make an unmerited profit, and this profit would entail an undeserved loss upon the promisee. For the promisee in negative agreements, unlike the promisee in affirmative agreements, has no redress against the promisor.[2] The latter did not violate the restrictive agreement while he was in possession of the *res*, and its violation by a subsequent possessor is no breach of contract by the promisor.

What persons, if any, other than the promisee may enforce compliance with restrictive agreements, depends wholly upon the intention of the parties to the agreement. Frequently the parties intend that the restriction upon the promisor's land shall be for the benefit of the promisee as owner of neighboring land and of any subsequent possessor of the whole or any part of the promisee's land. This is the case when a tract of land is divided into building lots to be sold under a general scheme by which certain restrictions are to apply to each lot for the benefit of every other lot into whosesoever hands they may come. Privity of estate between the promisee and the plaintiff is not essential to the enforcement of these restrictions. The benefit of the agreement passes not

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[1] Carter *v.* Williams, 9 Eq. 678; Nottingham Co. *v.* Butler, 16 Q. B. Div. 778, 787, 788; Rowell *v.* Satchell, [1903] 2 Ch. 212; Washburn *v.* Miller, 117 Mass. 376; Moller *v.* Presbyterian Hospital, 65 N. Y. App. Div. 134, and cases cited in 1 Ames, Cas. Eq. Jur. 173, *n.* 1. There is a casual statement by Jessel, M. R., in London Co. *v.* Gomm, 20 Ch. D. 562, 583, that a *bona fide* purchaser of an equitable estate would take subject to the burden of a restrictive agreement, and this *dictum* has received the extrajudicial approval of Collins, L. J., in Rogers *v.* Hosegood, [1900] 2 Ch. 388, 405, and Farwell, J., in Osborne *v.* Bradley, [1903] 2 Ch. 446, 451. It is difficult, however, to see either the justice or the legal principle upon which the *bona fide* purchaser of an equitable fee-simple should be less entitled to exception from the burden of the restrictive agreement than the innocent purchaser of a legal fee-simple. These *dicta* of the English judges are deservedly criticised in a recent article in the Solicitors' Journal (47 Sol. J. 793).

[2] Clements *v.* Welles, L. R. 1 Eq. 200; Feilden *v.* Slober, 7 Eq. 523; Evans *v.* Davis, 10 Ch. D. 747, 764; Patman *v.* Harland, 17 Ch. D. 353; Hall *v.* Ewin, 37 Ch. D. 74.

only to an assignee,[1] but also to a lessee[2] of the assignor, and probably to a subsequent possessor, who is a mere occupier.[3] Sometimes it is the intention of the parties that the restriction upon the promisor's land shall benefit third parties already in possession of neighboring land at the time of the promise. Accordingly, if the owner of land sells it in lots to different purchasers, but subject to the same restrictions, the prior purchaser of one lot may enforce the restrictive agreement of the later purchaser of another lot.[4] Similarly, a promise of the purchaser of lot 1 from A, a trustee for B, not to erect any building which would obstruct the view from the house on the adjoining lot 2, owned by B in his own right, is enforceable by B.[5]

If the restrictive agreement is intended for the benefit of the promisee alone, by adding to his comfort and enjoyment in the occupancy of his neighboring land, no other possessors can enforce the agreement.[6]

Intermediate between the intention to benefit every possessor in the occupancy of the neighboring land, and the intention to enhance the enjoyment of the promisee's occupancy alone, we find in the much approved judgment of Hall, V. C., in Renals *v.* Cowlishaw[7] the suggestion of still another possible intention, namely, the intention to benefit the promisee, not only as an occupant, but also as a future seller, by giving him the power, if he chooses to exercise it by an actual assignment of the agreement, of transferring the same benefits to any or all of his vendees. In such a case,

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[1] Rogers *v.* Hosegood, [1900] 2 Ch. 388; Nottingham Co. *v.* Butler, 16 Q. B. Div. 778; Parker *v.* Nightingale, 6 All. 341; DeGray *v.* Monmouth Co., 50 N. J. Eq. 329; Tallmadge *v.* East Bank, 26 N. Y. 105, and cases cited in 1 Ames, Cas. Eq. Jur. 172, *n.* 1, 180, *n.* 1.

[2] Taite *v.* Gosling, 11 Ch. D. 273.

[3] Presumably equity would not enforce the restriction at the suit of a disseisor, but would grant an injunction on a bill filed by the disseisee.

[4] Renals *v.* Cowlishaw, 9 Ch. D. 125, 128 (*semble*); Nottingham Co. *v.* Butler, 16 Q. B. Div. 778, 784 (*semble*); Collins *v.* Castle, 36 Ch. D. 243; Hopkins *v.* Smith, 162 Mass. 444; DeGray *v.* Monmouth Co., 50 N. J. Eq. 329, 335; Barrow *v.* Richard, 8 Paige 351; Brouwer *v.* Jones, 23 Barb. 153.

[5] Gilbert *v.* Peteler, 38 N. Y. 165.

[6] Keates *v.* Lyon, 4 Ch. 218; Sheppard *v.* Gilmore, 57 L. J. Ch. 6; Osborne *v.* Bradley, [1903] 2 Ch. 446; Formby *v.* Barker, [1903] 2 Ch. 539; Badger *v.* Boardman, 16 Gray, 559; Sharp *v.* Ropes, 110 Mass. 381; Clapp *v.* Wilder, 176 Mass. 332; Helmsley *v.* Marlborough Co., 62 N. J. Eq. 164, 63 N. J. Eq. 799; Equitable Co. *v.* Brennan, 148 N. Y. 661. See also Kemp *v.* Bird, 5 Ch. Div. 974; Ashby *v.* Wilson, [1900] 1 Ch. 66, in which cases the restrictive agreements of a subsequent lessee of A were unenforceable by a prior lessee of A.

[7] 9 Ch. Div. 125, 11 Ch. Div. 866.

therefore, a subsequent possessor, in order to enforce the restriction, must prove two distinct assignments by the promisee, an assignment of the land and an assignment of the contract.[1] The instances must be rare in which a promisor, willing to give the promisee the power of transferring the benefit of the agreement, would care whether the power were exercised by a double assignment of land and agreement or by the mere assignment of the land. Nor is it easy to see why this distinction should be of value to the promisee. For if the agreement be interpreted in the wider sense as intended to give the benefit to the promisee and any assignee of the land as such, a promisee, wishing under exceptional circumstances to convey the land without the benefit, could easily release the restriction as to the land about to be conveyed. It may be doubted, too, whether in Renals *v.* Cowlishaw and the other English cases, in which assignees of the land were denied the benefit of the restrictions because there was no actual assignment of the agreement also, the evidence was sufficient to prove any intention to require the double assignment. On very similar facts in several American cases the court decided that the benefit was intended to pass to any assignee of the land.[2]

It might be supposed that all restrictions upon the use of land which are enforceable as between the parties to the agreement would be equally effective in favor of and against third persons, within the rules already stated. In some jurisdictions, however, relief for or against strangers to the agreement is limited to those restrictions which make for greater pleasure or comfort in the occupation of the neighboring land. Agreements of the promisor not to use his land in competition with his neighbor, according to the decisions and *dicta* in a few states, are of value only as between promisor and promisee.[3] But the weight of authority is in favor of the opposite and, as it seems to the writer, the better opinion.[4]

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[1] See, in accordance with this view of Hall, V. C., Master *v.* Hansard, 4 Ch. Div. 718; Nalder *v.* Harman, 82 L. T. Rep. 594; Spicer *v.* Martin, 14 App. Cas. 12, 24; Rogers *v.* Hosegood, [1900] 2 Ch. 388, 408.

[2] Peck *v.* Conway, 119 Mass. 546; Post *v.* West, 115 N. Y. 361; Clark *v.* Martin, 49 Pa. 289; Muzzarelli *v.* Hulshizer, 163 Pa. 643.

[3] Taylor *v.* Owen, 2 Blackf. 301 (*semble*); Norcross *v.* James, 140 Mass. 188; Kettle Ry. *v.* Eastern Ry., 41 Minn. 461 (*semble*); Brewer *v.* Marshall, 19 N. J. Eq. 537 (four of twelve judges dissenting); Tardy *v.* Creasy, 81 Va. 553 (two of five judges dissenting).

[4] Holloway *v.* Hill, [1902] 2 Ch. 612; Robinson *v.* Webb, 68 Ala. 393, 77 Ala. 176; McMahon *v.* Williams, 79 Ala. 288; Frye *v.* Partridge, 82 Ill. 267; Watrous *v.* Allen, 57 Mich. 362; Hodge *v.* Sloan, 107 N. Y. 244 (two judges dissenting); Stines *v.* Dorman, 25 Oh. St. 580; Middletown *v.* Newport Hospital, 16 R. I. 319, 333 (*semble*).

If A may sell his land to B for a larger price because of his agreement not to use land that he retains in competition with B's use of the land purchased, and if this is a valid agreement as between A and B, it seems a highly unjust doctrine that permits A to sell, and C, although a purchaser with notice, to buy the land freed from the restriction, and gives B no remedy against either A or C.

The *res*, to which the benefit and burden of restrictive agreements attach, is commonly land. But it may be personal property. In the familiar case of the sale of a business with an agreement by the seller not to engage in the same business within a certain distance, the benefit of the agreement passes to a subsequent assignee of the business.[1] An instance of the burden of a restriction passing to the assignee of personalty is found in a recent New York case.[2] The owner of the copyright of a book upon the sale of one set of electrotype plates of the book to the plaintiff, agreed not to sell copies of the book printed from another set of plates below a certain price, and this agreement was enforced by an injunction against the defendant, a subsequent purchaser of the copyright with notice of the restriction.

The uncertainty as to the true legal principle of the decisions upon the passing of the benefit and burden of restrictive agreements is evident from the statement by Jessel, M. R., as late as 1882, that the doctrine of Tulk *v.* Moxhay,[3] a leading case on the subject, appeared to him to be "either an extension in equity of Spencer's[4] Case to another line of cases, or else an extension in equity of the doctrine of negative easements."[5] Subsequent judgments in England have made no choice between the alternatives suggested by the Master of the Rolls. On the other hand many American courts have countenanced the supposed analogy between restrictive agreements and negative easements.[6] But the

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[1] Benwell *v.* Innes, 24 Beav. 307; Fleckenstein *v.* Fleckenstein (N. J. Eq. 1903), 53 Atl. R. 1043; Francisco *v.* Smith, 143 N. Y. 488, and cases cited in 1 Ames, Cas. Eq. Jur. 187, *n.* 1.

[2] Murphy *v.* Christian Association, 38 N. Y. App. Div. 426. *See* also N. Y. Co. *v.* Hamilton, 28 N. Y. App. Div. 411.

[3] 2 Ph. 774.

[4] 5 Rep. 16.

[5] London Co. *v.* Gomm, 20 Ch. Div. 562, 583.

[6] "The reservation creates an easement, or servitude in the nature of an easement." *Per* Morton, J., in Peck *v.* Conway, 119 Mass. 546. See similar statements in Webb *v.* Robbins, 77 Ala. 176, 183; Hills *v.* Miller, 3 Paige 254; Trustees *v.* Cowen, 4 Paige 510, 515; Trustees *v.* Lynch, 70 N. Y. 440, 446, 447, 448, 449, 450; Wetmore *v.* Bruce, 118 N. Y. 318, 322.

courts of New Jersey have rejected this analogy,[1] and, it is submitted, they were right in so doing. There is, it is true, a certain superficial resemblance between restrictive agreements and negative easements. Two estates are essential to the passing of the benefit and burden of each.[2] But the differences between them are fundamental. An easement is an obligation between two estates. This relation is indicated by the common terms dominant and servient estates. Because the one is obligee and the other obligor, the relation continues the same into whosesoever hands one or both estates may successively pass, and, except for Registry Acts, whether the subsequent owners bought with or without notice. This cannot be said of restrictive agreements. The burden vanishes as soon as the land subject to the restriction comes to the hands of a purchaser for value without notice of the restriction. Moreover the burden by the intention of the parties may be limited at the outset to the original promisor.[3] The benefit too, if such is the understanding of the parties to the promise, may be limited to the promisee,[4] or in England, to the promisee and subsequent occupant of the promisee's land by express assignment of the contract.[5] The analogy of the negative easement is objectionable for the further reason that easements are confined to real property, but restrictive agreements apply equally to personal property.[6]

Nor is the doctrine of restrictive agreements illuminated by the suggested analogy to the doctrine of Spencer's Case. Upon covenants running with the land assignees are bound, without regard to notice, or absence of value, whereas notice, or the absence of value, is the very foundation of the subsequent possessor's liability on restrictive agreements. Nor does the doctrine of Spencer's Case apply to personal property.

In truth, the passing of the benefit and burden of restrictive agreements is not to be explained by any single analogy or principle. The imposition of the burden upon others than the promisor and the acquisition of the benefit by others than the promisee are the results of two very different principles.

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[1] Brewer *v.* Marshall, 19 N. J. Eq. 537, 543; DeGray *v.* Monmouth Co., 50 N. J. Eq. 329, 339.

[2] Gale, Easements (74) 10; Formby *v.* Barker, [1903] 2 Ch. 539.

[3] *Re* Fawcett, 42 Ch. D. 150.

[4] *Supra*, 179 and *n.* 6.

[5] *Supra*, 179, 180 *n.* 1.

[6] *Supra*, 181.

The burden is imposed upon a subsequent possessor of the *res*, whether real or personal, upon the same principle that the grantee of a guilty trustee, or the grantee of one already under contract to sell the *res* to another, is bound to convey the *res* to the *cestui que trust* or prior buyer. In all three cases there would be the like injustice, if the purchaser with notice, or the volunteer, were allowed to profit at the expense of the *cestui que trust* or promisee by ignoring the trust, the promise to convey, or the restrictive agreement. Equity, therefore, in all three cases imposes upon the grantee a constructive duty coextensive with the express duty of his grantor.

The right of third persons to the benefit of restrictive agreements is the result of the equally just and equally simple principle, that equity will compel the promisor to perform his agreement according to its tenor. If the restrictive agreement, fairly interpreted, was intended for the sole benefit of the promisee, only he can enforce it. If on the other hand it was intended for the benefit of the occupant or occupants of adjoining lands, then such occupant or occupants may compel its specific performance. It is to be observed that a grantee of the promisee acquires his rights not as assignee of the restrictive contract, but as assignee of the promisee's land. Accordingly the assignee of the land is none the less entitled to the benefit of the agreement, although there was no assignment of the contract,[1] or even although he was ignorant of its existence when he acquired the land.[2] The assignee's situation in this respect is closely analogous to the rights of the buyer of land from one to whom it had been previously sold with warranty. The last buyer enforces the warranty of the first seller not as assignee of the warranty, but as assignee of the land, for that is the meaning of the warrantor's undertaking. The analogy between the restrictive agreement and a warranty holds also in other respects. As the assignee of the land may sue upon the warranty in his own name without joining the warrantee,[3] so the subsequent possessor of the neighboring land may, as sole plaintiff, file his bill for an injunction against the promisor.[4] A warrantee,

[1] Peck *v.* Conway, 119 Mass. 546; Phœnix Co. *v.* Continental Co., 87 N. Y. 400, 408.

[2] Rogers *v.* Hosegood, [1900] 2 Ch. 388, 406.

[3] Wyman *v.* Ballard, 12 Mass. 304; Withy *v.* Mumford, 5 Cow. 137; Wilson *v.* Taylor, 9 Oh. St. 595. See also Noke *v.* Awder, Cro. El. 373, 486; Lewis *v.* Campbell, 8 Taunt. 715.

[4] Western *v.* Macdermott, 2 Ch. App. 72.

who has conveyed the land to another, can no longer enforce the warranty;[1] in like manner a promisee who has parted with all of his land in the neighborhood loses the right to enforce the restrictive agreement.[2] A release of the warranty by the warrantee after his conveyance to another is inoperative;[3] a release of the restrictive agreement by the promisee after parting with his land in the neighborhood is likewise of no effect as to the land conveyed by him.[4] A *bona fide* purchaser from the warrantee acquires the warranty free from any equitable defenses good against the warrantee;[5] it is believed that an innocent purchaser from the promisee should be allowed to enforce performance of a restrictive agreement, although the promisors might have defeated a suit by the promisee on the ground of fraud or by reason of some other equitable defense. But no case has been found involving this question.

These qualities, common to the warranty and the restrictive agreement, indicate that they both belong in the same class with bills and notes. For the holder of a bill or note sues in his own name, acquires his right, not as assignee of a *chose in action*, but as the *persona designata* within the tenor of the instrument, and, if a *bona fide* purchaser, holds free from equities and equitable defenses. If the right to enforce restrictive agreements were limited to assignees of the land, in privity of estate with the promisees, they, like assignees of a warranty, would be assimilated to indorsees of a bill or note payable to order. The restrictive agreement, however, is frequently intended to enure to the benefit of any possessor subsequent to the promisee,[6] or even to one who acquired the promisee's land before the making of the prom-

[1] Keith *v.* Day, 15 Vt. 660; Smith *v.* Perry, 26 Vt. 279. If the warrantee gave an independent warranty to his vendee he may sue the original warrantor after indemnifying his own vendee, but not otherwise. Green *v.* Jones, 6 M. & W. 656; Wheeler *v.* Sohier, 3 Cush. 219; Markland *v.* Crump, 1 Dev. & B. 94.

[2] Dana *v.* Wentworth, 111 Mass. 291; Keates *v.* Lyon, 4 Ch. 218; Trustees *v.* Lynch, 70 N. Y. 440, 451; Barron *v.* Richard, 3 Edw. Ch. 96, 101.

[3] Littlefield *v.* Getchell, 32 Me. 390 (*semble*); Chase *v.* Weston, 12 N. H. 413. See also Harper *v.* Bird, T. Jones, 102. The *dictum contra* in Middlemore *v.* Goodale, Cro. Car. 503, may be disregarded.

[4] Eastwood *v.* Lever, 4 D. J. & S. 114, 126; Western *v.* Macdermott, L. R. 1 Eq. 499, 506; Rowell *v.* Satchell, [1903] 2 Ch. 212; Hopkins *v.* Smith, 162 Mass. 444; Coudert *v.* Sayre, 46 N. J. Eq. 386, 396; Hills *v.* Miller, 3 Paige 254.

[5] Ill. Co. *v.* Bonner, 91 Ill. 114; Hunt *v.* Owing, 17 B. Mon. 73; Alexander *v.* Schreiber, 13 Mo. 271; Suydam *v.* Jones, 10 Wend. 180; Greenvault *v.* Davis, 4 Hill 643; Kellogg *v.* Wood, 4 Paige 578, 616.

[6] *Supra*, 178, 179.

ise.[1] In such cases the true analogue of the restrictive agreement is the note payable to bearer. The principle is clearly stated by Emott, J., in Brouwer *v.* Jones,[2] in which case a prior grantee of one part of a tract of land was allowed to enforce the restrictive covenant of a later grantee of another part of the same tract: "I am unable to see in what respect the relative dates of the conveyances of Brouwer and Mason [the common grantors] can make any difference. Every such covenant, in every deed given by them, was intended not only for their benefit but also for that of all their prior as well as subsequent grantees. . . . This court may, therefore, very properly be asked to interpose in behalf of any of the owners of the lots, as being parties for whose benefit the covenants were made."

J. B. Ames.

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[1] *Supra*, 179 and *n.* 4.

[2] 23 Barb. 153, 162. See the similar statement of Chancellor Walworth in Barrow *v.* Richard, 8 Paige 351.

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EXTENT OF THE ADMIRALTY JURISDICTION OF THE FEDERAL COURTS. — The Supreme Court of the United States, with four justices dissenting, has just rendered a decision which marks the greatest extension, thus far reached, of the federal jurisdiction in admiralty. A contract for the repair of an Erie canal boat in a Middleport dry dock was declared to be a maritime contract; and the lien on the vessel, given in such cases by the New York statute, was consequently held to be enforceable only in the federal courts. *Perry* v. *Haines*, 24 Sup. Ct. Rep. 8.

Whether the contract in question was maritime the court properly held involved three considerations: first, the place where the repairs were made; second, the character of the boat repaired; and third, the nature and extent of the waters on which the boat was navigated. As to the first point, it was rightly laid down that a contract to repair in dry dock is not a contract to be performed on land in a sense to prevent its being maritime. Contracts for the repair of ships have long been recognized as peculiarly subject to admiralty jurisdiction,[1] and permanent repairs below the water line must almost always be made in dry dock. In discussing the second question, the character of the vessel, if it is engaged in commerce and navigation, it may, according to this opinion, be subjected to the exclusive admiralty jurisdiction of the federal courts. Any narrower holding would seem inconsistent with the course of accepted judicial opinion on the point. The admiralty jurisdiction had already been extended over an ordinary grain barge without means of propulsion,[2] a floating elevator,[3] and a bath-house

[1] The Lottawanna, 21 Wall. (U. S.) 558.
[2] The Northern Belle, 9 Wall. (U. S.) 526.
[3] The Hezekiah Baldwin, 8 Ben. (U. S.) 556.

built on boats and designed for transportation.[4] In considering the third point, the nature and extent of the waters on which this canal boat was employed, the court had only to follow a precedent they had themselves established in a case which arose from a collision on the Chicago canal.[5] After the admiralty jurisdiction had once been extended to non-tidal waters,[6] thus departing from the old English doctrine, there seems no logical stopping place short of the point the court has reached. That this waterway was artificial cannot be decisive against the jurisdiction. Most of the channels into ocean ports are kept open by dredging, and navigation on many of our great rivers is rendered practicable only by artificial means. That transactions on these waters are not within the view of the admiralty courts would hardly be contended.

The decision of the court, then, seems sound. That unusual interest attaches to the case arises not so much from the fact that it involves any single point of great difficulty, as from the combination of extreme features which it presents. After this decision there seems open to the court but one reasonable limitation on the extent of the admiralty jurisdiction, a limitation which will probably be sustained should occasion arise. Where a body of water is entirely within a single state, and forms no part of a highway connecting different states, or opening on the high seas, it would seem unnecessary and profitless for the federal courts to assert their exclusive admiralty jurisdiction.

Declarations to Prove Non-Access. — It is a rule of long standing that a child born in wedlock is presumed legitimate.[1] This presumption even extends to a child born so shortly after marriage that conception must have taken place before.[2] It has also been commonly held that a husband and wife cannot, in order to rebut the presumption of legitimacy, testify to non-access in order to prove the bastardy of issue which has been conceived during the marriage.[3] A number of United States decisions have extended this rule to the case of children conceived before marriage but born after marriage, upon the ground, apparently, that as the presumption of legitimacy applies to such children, the rule of evidence should apply also.[4] The rule excluding testimony of non-access is commonly said to be founded on considerations of "decency, morality, and policy." The marriage of a man to a pregnant woman may perhaps in the great majority of cases be fairly taken to constitute an acknowledgment that the child is his. The law in presuming the child to be his acts apparently upon such grounds.[5] In this aspect of the case it may possibly seem that decency and policy require that a husband and wife remain unquestioned as to their intercourse before marriage. But there is good ground for an opposite view. Decency, morality, and policy may well require that a husband and wife be forbidden to testify to non-access during the married state, because such protection

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[4] The Public Baths, No. 13, 61 Fed. Rep. 692.
[5] *Ex parte* Boyer, 109 U. S. 629.
[6] The Genesee Chief, 12 How. (U. S.) 443.

[1] Co. Lit. 244 *a*.
[2] King *v.* Luffe, 8 East 193.
[3] Goodright *d.* Stevens *v.* Moss, Cowp. 592.
[4] Dennison *v.* Page, 29 Pa. St. 420; Rabeke *v.* Baer, 115 Mich. 328.
[5] King *v.* Luffe, *supra*.

is deemed necessary to the sanctity of married intercourse. To accomplish this protection, however, it is not necessary to prevent a husband from testifying against a presumption that he seduced his wife before he married her, or to prevent a wife from testifying that she was not seduced by the husband. Moreover cases undoubtedly have arisen, and may arise, where it would be unreasonable to suppose that the husband knew of his wife's condition at the time of marriage. To exclude the testimony in question in such a case might involve a grave injustice both to the husband and to the real heirs. In a case which recently came up before the House of Lords, it being shown that a child was born six months after marriage, and the jury being satisfied by expert testimony that conception must have taken place before marriage, it was sought to introduce a deposition by the husband that before he married his wife he had never had sexual intercourse with her, and that soon after she confessed that at the time of marriage she was with child by another man. Although urged that this was testimony of the parents to non-access, the evidence was held admissible, and a former English authority [6] overruled. *The Poulett Peerage*, [1903] A. C. 395. The case is defensible upon the grounds indicated above, and its result seems preferable to that reached in the United States decisions.

THE GARNISHMENT OF A DEBT. — Jurisdiction to garnish a debt not payable at a particular place, according to some cases, cannot be gained without personal service on the creditor.[1] These cases are overruled by the decision of the Supreme Court of the United States in Chicago, etc., R. R. Co. *v.* Sturm,[2] which holds that service on the garnishee alone, obtained in the state of his domicile, gives jurisdiction. That decision was based on reasoning and *dicta* which would allow jurisdiction irrespective of domicile wherever such service is obtained, — a view adopted by some previous cases.[3] The rejection of these *dicta* in the recent West Virginia case of *Pennsylvania R. R.* v. *Rogers*, 44 S. E. Rep. 300, suggests an inquiry into the basis of jurisdiction in such cases.

A man not served with process may be deprived of his property only by a state having jurisdiction *in rem* of that property.[4] Jurisdiction *in rem* depends on power over the *res*. A state has power to control, by process of its courts, physical objects within its territorial limits. It is for this reason [5] that, aside from considerations of comity, the sole test of jurisdiction of a corporeal *res* is its physical *situs*. As to an incorporeal *res* there is no such simple test, since an intangible thing can clearly have no actual physical *situs*. To declare, as the courts are fond of doing, that a debt has a *situs* in a particular place can amount only to saying that it will be treated, for purposes of jurisdiction, as a tangible *res* would be treated if it had such a *situs*. Legislative or judicial fiat cannot alone create jurisdiction. Such a declaration, therefore, is justified only if the state has in fact the same power to control the debt as to control a tangible *res* whose *situs* is within its territory.

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[6] Anon. *v.* Anon., 22 Beav. 481; 23 Beav. 273.

[1] See cases collected in Minor, Confl. of L., § 125.
[2] 174 U. S. 710.
[3] Collected in Minor, Confl. of L., § 125.
[4] Pennoyer *v.* Neff, 95 U. S. 714.
[5] See Sutherland *v.* Nat'l Bank, 78 Ky. 250.

Control of a debt consists in compelling its payment and release. This, manifestly, a state cannot do, unless it has jurisdiction over the releasing as well as the paying party. Personal service on the debtor-creditor would, therefore, on theory, seem essential to jurisdiction.

As a matter of practice, to require such personal service seems the only way of doing justice to the defendant. When a man leaves a chattel in another state, not in the care of somebody who would know of its seizure, he is fairly presumed to consent that it shall be dealt with on the insufficient notice of service by publication. But no creditor thinks of leaving a caretaker of his debt when he leaves his obligor behind him. Payment in his absence to an alleged creditor will frequently be without his knowledge or any chance on his part to dispute the alleged claim. This offers a golden opportunity to fraudulent garnishors. The rights of *bona fide* garnishors, on the other hand, would be made only slightly more difficult to enforce by a rule requiring service on the debtor-creditor. Since in the vast majority of cases the garnishee is a corporation doing business in the state of the defendant's residence, personal service on both may be had there. The reasoning in the case of Chicago, etc., R. R. *v.* Sturm, would seem unfortunate, then, both on theory and in practice; and the West Virginia court did well not to follow it in a case not exactly covered by that decision.

Rights of Creditors of the Donee of a Power of Appointment by Will in the Property Subject to the Power. — In determining under what circumstances the creditors of a person possessing a power of appointment by will can reach the property subject to the power, courts of equity have generally reached results which are consistent with the general principles of equity jurisdiction. The donee of such a power has no estate in the property subject to the power; it follows, then, that if he dies without exercising the power, equity will not subject the property to the claims of his creditors.[1] Neither will equity compel an execution of the power in favor of the donee's creditors, for a compelled execution is held not to be an appointment within the terms of the power.[2] If, however, the donee exercises the power in favor of a volunteer, and then dies insolvent, the appointee will be postponed to the creditors. The donee should have exercised the power in favor of his creditors; its exercise in favor of a volunteer was in the nature of a fraud upon them, and the appointee will be considered a constructive trustee of the property which he has obtained.[3] Recently the question arose under what circumstances the appointee of such a power is a volunteer, and in deciding it the House of Lords appears to have added a peculiar doctrine to the law of powers. In consideration of a loan, the donee of a power of appointment by will agreed to make the debt a first charge on the fund subject to the power. He died insolvent, leaving a will executed according to this agreement. The court held that the appointee was a volunteer, and that the fund should be divided among the general creditors of the deceased. *Beyfus* v. *Lawley*, [1903] A. C. 411.

A contract for the exercise of a power of appointment by will is peculiar, since, as previously stated, a court of equity will not compel specific per-

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[1] Jones *v.* Clifton, 101 U. S. 225.
[2] See Thacker *v.* Key, L. R. 8 Eq. 408.
[3] *In re* Harvey's Estate, 13 Ch. D. 216.

formance. It is difficult, however, to see how this peculiarity can exempt such a transaction from the application of the broad equitable rule that one who has given good consideration for a contract becomes a purchaser for value of the right which he obtains upon a performance of the contract. On the analogy of a line of cases whose soundness has not been questioned, the appointee would seem to be in a position even stronger than that of the purchaser there protected. If the vendor on a contract for the sale of chattels becomes insolvent after receiving the purchase money, the purchaser is entitled to specific performance even though the chattels are not of peculiar value.[4] It would be inequitable to allow the general creditors to get the benefit both of the property and of the purchase money. The result of the principal case is to confer this unfair advantage upon the general creditors where the question is not whether the purchaser shall be granted an advantage which he would not otherwise possess, but whether he may keep a legal right which he has already obtained.

Since the only American case on the point is *contra*,[5] and since our courts have in other cases been reluctant to subject property appointed by will to the claims of creditors of the donee,[6] it seems improbable that this doctrine will be adopted in America.

Executory Devises Conditioned on Failure to Alienate a Fee Simple. — The tendency of our law during many centuries has been to remove all restraints on the alienation of real property. From this it has resulted that not only have most restrictions imposed by the law been removed, but also the courts have become alert to discover and frown upon attempts by individuals to so restrain the enjoyment of property. Thus an executory devise of an estate conditioned on the failure of the holder to dispose of it during life is held void, since it is a restraint on alienation by will.[1] So also an executory devise conditioned on failure to dispose of the property by will is held void as a restraint on conveyance *inter vivos*.[2]

A recent Iowa case suggests another closely related class of executory devises, which the courts also hold void, namely, executory devises conditioned on failure to alienate either during life or by will. *Meyer* v. *Weiler*, 95 N. W. Rep. 254. Most of the modern cases holding such limitations void are rested purely on authority, and it is necessary to go to the older cases for reasons. No court has rested its decision on the express ground that they are restraints on alienation, no matter how much it may have been influenced by the other lines of cases. Such an objection is clearly untenable, since full power to alienate is given. It is said that such a limitation is repugnant to the gift of the fee and cannot stand because the right not to alienate, and so to allow the estate to go to the heirs, is a necessary incident of the fee.[3] Such an objection cannot even be supported technically, for from the very nature of an executory devise it takes away some incident of the preceding fee, and this incident does not seem to demand

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[4] Parker *v.* Garrison, 61 Ill. 250.
[5] Patterson *v.* Lawrence, 83 Ga. 703.
[6] Wales Adm'r *v.* Bowdish Ex'r, 61 Vt. 23.

[1] Joslin *v.* Rhoades, 150 Mass. 301.
[2] Channell *v.* Aldinger, 96 N. W. Rep. 781 (Ia.).
[3] Shaw *v.* Ford, 7 Ch. D. 669.

different treatment than any other. Another reason advanced is that the executory devise is bad because conditioned on an event entirely within the control of the holder of the previous estate.[4] Exactly the same thing is true of many admittedly valid devises, for example a devise conditioned on the previous holder's remaining single. Again it is said that an executory devise cannot be limited to take effect at the very moment of the ending of the fee which it terminates. This also is not true. In fact most executory devises do vest at that time, as would happen for example where an estate is given to A in fee, and if he dies without issue living at his death, over to B.

That there is nothing fundamental in the objections to such limitations is evident from the fact that the courts are perfectly willing to allow the same result to be accomplished in another way, namely, by a gift to A for life with power to dispose of the property by deed or will, remainder over.[5] So it seems that this rule is founded on no substantial reason, but on the merest technicality, since it is possible to accomplish the same result by a change of phrase. It has nevertheless become generally established. It is an instance, unusual in modern law, of a rule, founded on no considerations of public policy, which overthrows the intention of the parties, when the language used is most appropriate to accomplish the desired result.[6]

Necessity of Notice to Voters. — It is a general rule of statutory construction that where the time and place of a meeting or election are set by statute, provisions as to the notice which must be given to voters are merely directory, the notice being in that case merely for further information. The right to vote comes from the statute, and should not be lost through the negligence of those officers whose duty it is to publish the notice.[1] But if either the time or the place of the meeting is not fixed by law, so that further notice is essential to enable the voter to act, these statutory provisions are usually regarded as mandatory.[2] So New England town meetings are held illegal if the provisions for notice have not been literally performed.[3] This doctrine has been carried so far that when the time of meeting has been inadvertently omitted from the notice recorded, it cannot be shown that it was in fact contained in the notices posted, nor is evidence that all the legal voters were present competent to render the acts of such a meeting legal.[4] The warrant containing the notice is regarded as the authority for the meeting, and must be strictly according to law.

It is evident that such a construction may frequently cause the will of the people to be defeated by the technical omission of some official. A recent New Jersey case shows to what extent a court will go to avoid this unfortunate result. The prosecutor was present and voted without protesting at the annual meeting of a street lighting district, for which the notice had not been posted for the statutory period of ten days. It was not shown that any

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[4] Jackson *v.* Robins, 16 Johns. (N. Y.) 537.
[5] Stuart *v.* Walker, 12 Me. 145.
[6] See Gray, Res. on Alien. 48.

[1] People *v.* Cowles, 13 N. Y. 350; State *v.* Lansing, 46 Neb. 514.
[2] Cooley Const. Lim., 7th ed. p. 909.
[3] Commonwealth *v.* Smith, 132 Mass. 289.
[4] Sherwin *v.* Bugbee, 17 Vt. 337.

voters had failed to receive notice of the meeting. The court held that the prosecutor was estopped from questioning its regularity. *Brown* v. *Street, etc., of Woodbridge*, 55 Atl. Rep. 1080 (N. J., Sup. Ct.). Here, although the time was set by law, the place was left to be determined by the notice, so that by the strict construction of the New Jersey courts[5] any irregularity in the notice would be fatal. The court therefore was forced to take refuge in the doctrine of estoppel to defeat the action. Such a course is very hard to support in the absence of anything showing that the prosecutor knew of the irregularity of the notice when he participated in the meeting.[6]

It would seem to be wiser policy to avoid such technical distinctions and to regard these provisions for notice as directory in all cases. Their violation should make the vote illegal only when harm actually results. This has long been the view in New York and Iowa,[7] and has been followed elsewhere.[8] In case of an election it ought not to be enough to show that one or two voters have lost their votes. If the great body of electors voted, the election should not be set aside unless it is apparent that the result might have been changed had they all voted.[9] This is in accord with those numerous cases which hold that an election should not be set aside for irregularities which do not affect the result.[10] A meeting, however, requires a stricter test, as one man might, by voicing his views, influence the result. The proceedings therefore should be set aside if the complainant himself was prevented from attending. In either case it is the harm caused by the defective notice, and not the defective notice itself, which should render the action of the voters illegal.

Enforcement of Obligations Imposed by Foreign Corporation Laws. — In a foreign jurisdiction judgment will be granted only on those obligations which are remedial rather than penal.[1] In enforcing a penal obligation the state as sovereign punishes an individual. This the sovereign can do only within its own jurisdiction. Nor does the fact that a benefit inures to an individual from such punishment necessarily prevent its being penal. For instance, the obligation to pay exemplary damages is regarded as penal.[2] It is often, however, a matter of some difficulty to say whether or not an obligation is of this class. In this respect certain cases where liability is imposed by the corporation law of a foreign jurisdiction appear to have given the courts peculiar trouble. That corporations doing business in a foreign jurisdiction may not escape wholesome restrictions imposed by the corporation laws of the state creating them, it is well that the obligation should not be declared penal unless such an intent on the part of the legislature clearly appears. Some obligations, however, are necessarily penal. Thus if the obligation is imposed without reference to the resulting damage, it is submitted that it must be regarded as a punishment. If, on the other hand, the extent of the liability imposed is made to correspond to the

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[5] Canda M'f'g Co. *v.* Woodbridge, 58 N. J. Law 134.
[6] School District *v.* Atherton, 12 Met. (Mass.) 105.
[7] People *v.* Peck, 11 Wend. (N. Y.) 604; Dishon *v.* Smith, 10 Ia. 212.
[8] Seymour *v.* City of Tacoma, 6 Wash. 427.
[9] Adsit *v.* Secretary of State, 84 Mich. 420.
[10] Fry *v.* Booth, 19 Oh. St. 25; Sprague *v.* Norway, 31 Cal. 173.

[1] Blaine *v.* Curtis, 59 Vt. 120.
[2] *Ibid.*

damage suffered, the obligation is merely remedial. Applying this test, obviously the ordinary individual liability of stockholders is not penal.[3] On the other hand, where directors are made individually liable for the debts of the company when they have signed false certificates as to the amount of the capital stock paid in, the obligation seems clearly penal, and the holding of the Supreme Court of the United States to the contrary[4] is hard to defend. In a recent New York case the court dealt with a New Jersey statute which made the directors liable to the corporation for dividends declared and paid out of the capital stock. The court held that the obligation was not penal. *Hutchinson* v. *Stadler*, 85 N. Y. App. Div. 424. This view seems in accord with the test suggested.

Having established that an obligation is not penal, it still does not necessarily follow that it will be enforced in a foreign jurisdiction. Where a statute creates a right which did not exist at common law, and prescribes a remedy, this remedy is considered to be the only form of remedy which can be used,[5] on the theory that such was the intent of the legislature. This doctrine has been applied to corporation statutes of the sort under discussion.[6] Whenever, in a foreign jurisdiction, the enforcement of this prescribed remedy involves practical difficulties, a refusal to enforce it might well be justified. For example, where a foreign corporation and a large number of non-resident stockholders are necessary or desirable parties to the bill in equity which the statute prescribes, the court would refuse jurisdiction since it could not well control the parties.[7] Again, the local courts might be without the machinery to enforce the obligation imposed by the foreign law. This objection to enforcement, however, might be lessened by the existence of a similar local statute, in which case either the local machinery has been provided, or the courts have learned to do without it in dealing with the local cases. This consideration apparently influenced the judges in the case cited in the text. Their opinion leans to the side of enforcing such obligations, and this, in general, seems to be the better view.

Recovery in an Action of Deceit for Expression of Opinion. — It is authoritatively laid down in the text-books and cases that in an action for deceit the false representations must be as to material facts, and that no liability is incurred for the mere expression of opinion.[1] The reason usually given for the rule is, that the law will not protect those who do not exercise ordinary prudence. It is apparent that this reason applies only to those few cases where it can fairly be said that the injured party was negligent in relying upon the statements of opinion. Even there, however, the reason seems objectionable, for it runs contrary to the fundamental rule of torts that contributory negligence is no defense to actions for intentional wrongs. It may of course be contended that that rule applies only to cases of physical injury, but on principle there appears no more reason why the law should require persons to guard against deception than against wilful physical injury.

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[3] Hawthorne *v.* Calef, 2 Wall. (U. S.) 10.
[4] Huntington *v.* Attrill, 146 U. S. 657.
[5] Farmers, etc., Bank *v.* Dearing, 91 U. S. 29.
[6] Erickson *v.* Nesmith, 15 Gray (Mass.) 221.
[7] Erickson *v.* Nesmith, 4 Allen (Mass.) 233.

[1] 1 Bigelow, Fraud 473.

It is easy, however, to understand why in many cases recovery could not be allowed for false statements of opinion. The difficulty lies in proving one of the essential elements of the cause of action, the *scienter*, or fraudulent intent. To establish this point it is necessary to show that the defendant did not have an honest belief in the truth of his representations.[2] Where they consist of matter of fact, proof of their actual falsity is practically sufficient, but in case they were made as expression of opinion, it is necessary to prove that the defendant did not really have that opinion, to do which is obviously difficult. Another difficulty is that of proving reliance upon the statement of opinion by the party injured. This is particularly true in the case of "seller's talk" which consists largely in statements of opinion. Upon these grounds it may be urged that injustice might frequently be done by submitting such cases to a jury, which would often find fraud where there was none.

The cases plainly show, however, that the rule, though it doubtless exists, is often disregarded. Thus, where statements of opinion are made as resting upon knowledge,[3] or where the means of forming a correct opinion are within the reach of one party only,[4] the courts allow recovery. Even in cases of statement of value[5] and representation as to law,[6] where the rule is usually regarded as without exception, a defendant has been held liable by some courts when his moral obliquity was clearly made out to have been the cause of the plaintiff's injury. Further, the courts frequently avoid the rule by finding in a statement of opinion some implied representation of fact. A recent New Hampshire case is an example. A Christian Science "healer" represented to a patient suffering with appendicitis that he could cure her by Christian Science treatment, and that she did not need a surgical operation. The court followed previous New Hampshire decisions in holding that it should have been left to the jury to say whether there was not some representation of fact for which the defendant could be held liable. *Speed* v. *Tomlinson*, N. H. Sup. Ct., Oct. 6, 1903.

This is virtually submitting to them the real questions at issue, namely, the fraudulent intent of the defendant and the reliance of the plaintiff. In view of the fact that in almost no cases will the rule under consideration stand in the way of recovery by an injured party, when all the essential elements of a cause of action are present, it would seem that the rule itself is of little value.

PARTNERSHIP ASSOCIATIONS AS PARTIES TO ACTIONS. — Legislatures can of course create corporations which are recognized everywhere as legal entities. Whether similar entities are created when the legislature of a state confers the power of suing and being sued in an artificial name on other combinations of individuals, lacking some essential of a corporation, such as partnership associations, is an interesting question. If these statutes merely prescribe rules of procedure, it follows that they are of no force outside the state where passed. This is the view taken in Massachusetts.[1] A

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[2] Derry *v.* Peek, 14 App. Cas. 337, 374.
[3] Cabot *v.* Christie, 42 Vt. 121.
[4] Hedin *v.* Minneapolis Med. & Surg. Inst., 62 Minn. 146.
[5] Bacon *v.* Frisbie, 15 Hun (N. Y.) 26.
[6] Townsend *v.* Cowles, 31 Ala. 428.

[1] Edwards *v.* Warren, etc., Works, 168 Mass. 564.

recent federal decision, however, treats such statutes as creating artificial persons which, like corporations, should be regarded as proper parties to actions even in other jurisdictions. *Sanitas Nut Food Co.* v. *Force Food Co.*, 124 Fed. Rep. 302 (Circ. Ct., W. D. N. Y.). Beyond these decisions practically no cases upon the point have been found. The United States Supreme Court cases[2] which refuse, in determining jurisdiction over partnership associations, to apply the familiar presumption as to citizenship of members of corporations, are not in point, since that court considered corporations legal entities before that presumption arose.[3] In point of fact, courts usually avoid the difficulty by finding that the organization, though called by another name, is in fact a corporation.[4]

The Massachusetts court[5] rightly laid it down as law that if the statute merely created a remedy it should have no extra-territorial effect, while if a right were created the action should be permitted in other jurisdictions. If it is a matter of remedy, the association name must be used merely as a symbol representing the name of each individual member, and the only rights involved must be individual rights which might have been determined by actions in the individual names. If it is a matter of right, however, that right must exist in or against an artificial entity distinct from the members who compose it. The name used must represent a new-born artificial person, and must not be a rechristening of natural persons. Even Massachusetts admits, in the case of corporations, that rights against such an entity are new rights, distinct from rights against the individuals composing it. The question is thus reduced to this: are partnership associations a new form of artificial person?

Corporations were for years the only artificial persons given a place in the courts, but there is no inherent reason why legislatures should not be able to create new forms of legal entities. England, by the Taff Vale decision, has recognized that such beings may exist. The House of Lords, without statutory authority, allowed a suit against an anomalous legal entity, an unincorporated trade union.[6] This view might equally well be held as to partnership associations. To say that the partnership association name is but another name for a natural person does not accord with the fact. No single individual could be brought into court by the use of the association name. A further indication that the association and not the individual is the party to the record, is that execution will only run against association property.

In addition to this technical argument, there is a strong argument of practical necessity in favor of this view. These associations are frequently composed of several thousand persons who are scattered over wide areas. If a man possessing a right against such an association is to have any substantial relief it must be given against the association. This argument had very great weight in the Taff Vale case. Ascribing a legal entity to a body of men is a fiction, but it is a useful fiction that very closely represents the facts as conceived by the modern business world. The law should possess the power of growth, and when required by industrial development, should recognize new kinds of artificial persons.

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[2] Great Southern Co. *v.* Jones, 177 U. S. 449.
[3] Bank of the United States *v.* Deveaux, 5 Cranch (U. S.) 61.
[4] Edgeworth *v.* Wood, 58 N. J. Law 463.
[5] Edwards *v.* Warren, etc., Works, *supra.*
[6] Taff Vale Ry. Co. *v.* Amalgamated Society, [1901] A. C. 426.

Interference with Receivers Constituting Contempt. — It is a singular fact that, although there is practically no conflict on the question of how far a court will go in protecting its receiver, yet no case attempts to define the limitations of the court's powers in this respect. The courts have been content to rest each particular case on the indefinite proposition that any person intentionally interfering with the possession or management of a receiver is guilty of a contempt. This is because the receiver is an officer of the court appointing him, and his possession and management are those of the court.[1]

Notwithstanding, however, the breadth of the rule laid down, an examination of the cases shows that all contempts with reference to receivership may be brought within one of two classes. The first class consists of acts of physical or personal interference with the possession or management of the receiver. These may be illegal acts directed against the receiver or against anything under his control;[2] or they may be acts ordinarily legal which involve an ouster of the court from its possession or management of the property. Such are seizures by persons claiming superior title,[3] or by officers of another court levying under civil process.[4] An assertion of right should be made by application to the court appointing the receiver, for it stands ready to adjust the rights involved. The second class of contempts is less obvious than the first. It consists of suits brought against the receiver as such in another court. A few jurisdictions have refused to recognize this class,[5] but it is supported by the great weight of authority.[6] These are contempts for two reasons. Such suits necessarily force the court, through its receiver, to become a party to a suit in another court. Moreover, the court by establishing the receivership has sequestrated the property or business for its own exclusive jurisdiction for the purpose of caring for it and securing all rights concerned. Such suits are, therefore, an implication that the court cannot or will not do justice.

A recent English case suggests the serious question whether ordinary business competition, and, as involved in that, whether strikes during the receivership are contempts. *Dixon* v. *Dixon*, 89 L. T. 272 (Eng., Ch. D.). While in the language of a few cases the fact of striking against a receiver is a contempt,[7] an examination of the cases will reveal that these expressions are mere *dicta*. All the cases show acts of violence, intimidation, or conspiracies, within the undoubted class of ordinary illegal interference. The cases of business competition, likewise, show something illegal in addition to the fact of competition, such as misrepresentation amounting to a business libel,[8] or the use of a patent[9] to which the receiver had an exclusive right. It is believed that the classification submitted above, thus including all the decided cases, describes the proper limitations. For, it is to be noticed that while certain rights, such as the right to sue in another court or to personally assert a superior title, are destroyed by the application of this doctrine, still these are only formal rights. The substantial rights to

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[1] *In re* Tyler, 149 U. S. 164.
[2] *In re* Higgins, 27 Fed. Rep. 443.
[3] Moore *v.* Mercer Wire Co., 15 Atl. Rep. 737 (N. J.).
[4] Russell *v.* East Anglian Ry. Co., 3 Mac. & G. 104.
[5] Kinney *v.* Crocker, 18 Wis. 74; Allen *v.* The Central R. R. of Iowa, 42 Ia. 683
[6] Thompson *v.* Scott, 4 Dill. (U. S. C. C.) 508.
[7] *In re* Higgins, *supra*.
[8] Helmore *v.* Smith, 35 Ch. D. 449.
[9] *In re* Woven, etc., Co., 12 Hun (N. Y.) 111.

property or damages still subsist, although they must be asserted only in one forum. The right to strike and the right to compete are, however, substantial, and not merely formal rights. These, together with all other substantial rights, such as titles or liens, should remain unaffected by the receivership. A receiver is appointed to continue a business or care for property in the ordinary business way. Special rights are not conferred; which would be the effect if the substantial rights of other parties were curtailed.

RECENT CASES.

ADMIRALTY — EXTENT OF FEDERAL JURISDICTION. — A contract was made for the repair in dry dock of a canal boat running on the Erie Canal. The statutes of New York give a lien for such repair. *Held*, that the lien is founded on a maritime contract, and hence subject to the exclusive admiralty jurisdiction of the federal courts. *Perry* v. *Haines*, 24 Sup. Ct. Rep. 8. See NOTES, p. 186.

ALIENATION OF AFFECTIONS — PLAINTIFF'S HUSBAND THE SEDUCING PARTY. — In an action for the alienation of a husband's affections, evidence was introduced tending to show that the husband had sought and solicited the defendant. *Held*, that the defendant is liable for damages regardless of whether she or the husband had been the active persuading party. *Hart* v. *Knapp*, 55 Atl. Rep. 1021 (Conn.).

The court reaches its conclusion by applying the analogy of actions by a husband for criminal conversation, in which it is no defense to show that the acts were committed by procurement of the wife. *Bedan* v. *Turney*, 99 Cal. 649. These actions for criminal conversation are commonly allowed on the ground that the wife is incapable of giving such consent as will bar recovery. The fundamental basis of this rule is that defilement of the marriage bed is the gist of the action, and consequently proof of the unlawful act of intercourse alone is sufficient. Actions for alienation of affections, however, are sustained on a different basis, namely, loss of *consortium*, and it would seem to follow that recovery should not be allowed unless the defendant is shown to have been instrumental in depriving the husband or the wife of the other's conjugal society. By the better view, therefore, in order to maintain an action for the alienation of a husband's affections, it must affirmatively appear that the defendant was the active persuading party. *Churchill* v. *Lewis*, 17 Abb. New Cas. 226; *Waldron* v. *Waldron*, 45 Fed. Rep. 315.

ARREST — PRIVILEGE — PERSON UNDER BAIL FOR ANOTHER OFFENSE. — The petitioner was indicted by a Federal grand jury in New York, arrested by virtue of a warrant issued by a United States commissioner, and admitted to bail. He was later indicted in the District of Columbia, and re-arrested on a second warrant issued by the same commissioner. *Habeas corpus* proceedings were brought. *Held*, that the second arrest should be vacated. *United States* v. *Beavers*, 30 N. Y. L. J. 481 (U. S. Dist. Ct., S. D. N. Y.).

The court considers it immaterial that the petitioner had given bail on the first arrest instead of remaining in the marshal's care, considering the custody of the sureties but a continuance of the original imprisonment. This reasoning accords with general statements frequently made as to the nature of bail, but ignores at least one important difference. A person in the care of his sureties may ordinarily, by forfeiting his bail, leave the jurisdiction, but one in the hands of the marshal cannot. The result of the doctrine of the principal case would be that one under light bail for an assault would be exempted from arrest for treason, and given time to escape. All the previous authorities found are against such a conclusion. See *Ingram* v. *State*, 27 Ala. 17; *Wheeler* v. *State*, 38 Tex. 173. Action under one arrest may easily be suspended until the proceedings resulting from the other are terminated, and thus contradictory orders may be avoided. This has been done even where the two offenses were against different sovereignties. *In re James*, 18 Fed. Rep. 853.

ATTORNEY AND CLIENT — DEFENSE OF AN INDIGENT — LIABILITY OF COUNTY FOR COMPENSATION. — *Held*, that a statute providing that a court may award compensation to counsel assigned for the defense of an indigent prisoner is not in violation of

a constitutional provision that no county shall pay out money to, or in the aid of, any individual, or be allowed to incur any indebtedness except for county purposes. *People* v. *Grout*, 30 N. Y. L. J. 453 (N. Y. App. Div.).

Before this statute the courts of New York followed the general rule in holding that an attorney assigned as counsel to an indigent could not recover from the county upon a *quantum meruit*, but must look to his client for remuneration. *People* v. *Niagara County*, 78 N. Y. 622. This rule, however, is not based upon the idea that no benefit is conferred upon the county by such services, but upon the ground that the attorney is under a professional obligation to render them, the consideration having previously been given by the state in admitting him to practise in the courts. *Elam* v. *Johnson*, 48 Ga. 348. The correctness of the decision in the principal case seems to depend upon whether the legislature, recognizing the insufficiency of such antecedent consideration, meant to add a pecuniary reward, or whether it intended to relieve a poor prisoner altogether of the burden of his own defense by providing counsel for him at the public expense. It is probable that the legislature had both objects in view, and if so the decision is sound.

Bailment — Liability of Bailee for Acts of Servant. — The plaintiff, a coachbuilder, loaned a carriage to the defendant while the latter's trap was being repaired. The coachman in charge of the defendant's carriage-house, without the permission or knowledge of his master, used the carriage on a frolic of his own and damaged it by his negligence. *Held*, that the defendant is liable on his contract of bailment. *Sanderson* v. *Collins*, 89 L. T. 42 (Eng., K. B.).

In general, the master is not liable in tort for the acts of the servant not done within the scope of the servant's authority. *Illinois Central R. R. Co.* v. *Latham*, 72 Miss. 32. But modern cases hold that where the master is under a contractual duty and delegates it to a servant who fails to perform it, the master is liable, whether the servant's disregard of duty be negligent or wilful. *Weed* v. *Panama R. R. Co.*, 17 N. Y. 362. The decision is in accord with this authority, and the result reached seems just. A seemingly contrary result is found in cases which hold that the bailee is not liable for the embezzlement by his servant of the thing bailed, unless negligent himself. *Smith* v. *First National Bank in Westfield*, 99 Mass. 605. But these cases may possibly be distinguished because of the criminal nature of the servant's act; and, furthermore, even in them the courts seem to be tending to hold the bailee to a higher degree of responsibility than formerly. *Preston* v. *Prather*, 137 U. S. 604.

Breach of Marriage Promise — Liability of Parent for Causing. — The defendants, maliciously and by slanderous representations, induced their son to break his engagement with the plaintiff, thereby causing her material damage. *Held*, that the plaintiff has no right of action against the defendants for causing the breach of contract. *Leonard* v. *Whetstone*, 68 N. E. Rep. 197 (Ind., App. Ct.).

The court bases its decision partly on the ground that procuring the breach of an engagement to marry is not actionable. In general one persuading another without just cause or excuse to break any contract with a third party is liable to the latter. *Jones* v. *Stanly*, 76 N. C. 355; *Rice* v. *Manley*, 66 N. Y. 82. Since the plaintiff's right, the defendant's wrong, the damage caused, and the causal connection are essentially the same where the contract broken is an engagement to marry, as in any other case, there appears no sufficient reason for making an exception. The court takes the further ground that parental advice as to the performance of such a contract should be left absolutely free. In actions for defamation, however, public policy has been held to require only a conditional privilege for communications between parent and child. *Kimble* v. *Kimble*, 14 Wash. 369. It is not apparent why public policy should vary merely because the action is for causing wrongful breach of contract. Since the defendants' representations were malicious as well as slanderous, the decision would appear questionable.

Burden of Proof — Quantum of Proof in Civil Actions Based on a Crime. — In a civil action for a felonious assault the defendant requested a ruling to the effect that the plaintiff must prove his case beyond a reasonable doubt. *Held*, that the request should be refused. *Kurz* v. *Doerr*, 86 N. Y. App. Div. 507.

The case is of interest as showing the general tendency of the law of New York with regard to a question which is as yet unsettled in that state. It is supported by the more modern New York decisions upon this point, and is in accord with the great weight of American authority. *Davis* v. *Rome, etc., R. R. Co.*, 56 Hun (N. Y.) 372. The view taken seems clearly sound. When, as in criminal prosecutions, the object is punishment alone, the courts have humanely refused to convict until every reasonable doubt of the guilt of the accused has been excluded. But where, as in the principal

case, a mere civil liability is sought to be established, the reason of that rule fails. Again, in such cases, were there no question of crime involved, a preponderance of the evidence would admittedly be sufficient. It is difficult to see how the fact that the defendant has incurred a liability to the state as well as to the plaintiff, should cast upon the latter the burden of establishing his cause more conclusively.

CHECKS — IMPERSONAL PAYEE. — A check, drawn by the plaintiff, which was made out to no payee other than a line drawn through the space where the name of the payee should have been, was paid by the defendant. The inferior court held that the check was not payable to bearer, and that the defendant might not charge the plaintiff with the amount paid on the incomplete check. By an evenly divided court this holding was left undisturbed on appeal. *Gordon* v. *Lansing State Savings Bank*, 94 N. W. Rep. 741 (Mich.).

The general rule that a check to be valid must have a definite payee, is departed from in the case of a check drawn "to the order" of an impersonal payee, such as to "number 1685," or to "bills payable." *Willets* v. *Phœnix Bank*, 2 Duer (N. Y.) 121; *Mechanics Bank* v. *Straiton*, 3 Abb. Dec. (N. Y.) 269. Such checks are treated as payable to bearer in order to carry out the intention of the maker, shown by his use of words of negotiability, that the check be a negotiable instrument. Where a check was payable merely "to order," the formal requisite of a definite payee was dispensed with for the same reason. *Davega* v. *Moore*, 3 McCord (S. C.) 482. This reasoning would seem to apply equally well to a check payable "to the order" of a line. In this case, as in the others, the maker would seem to have filled in the space for the payee in such a way as to show his indifference as to the particular payee of the negotiable instrument which he intended to put forth.

CONFLICT OF LAWS — ENFORCEMENT OF OBLIGATIONS IMPOSED BY FOREIGN STATUTES. — A New Jersey corporation did business in New York. By statutes in both jurisdictions the directors were liable to the corporation for dividends declared and paid out of the capital stock. *Held*, that a New York court will enforce this liability. *Hutchinson* v. *Stadler*, 85 N. Y. App. Div. 424. See NOTES, p. 192.

CONFLICT OF LAWS — JURISDICTION — GARNISHMENT OF DEBT OWED BY NON-RESIDENT. — A corporation domiciled in Pennsylvania, but having an agent in West Virginia, owed a debt to an employee in Pennsylvania. A creditor of the employee sought to garnish the debt without service of process on the employee by service upon the agent of the corporation in West Virginia. *Held*, that the West Virginia court has no jurisdiction. *Pennsylvania R. R. Co.* v. *Rogers*, 44 S. E. Rep. 300 (W. Va.). See NOTES, p. 188.

CONFLICT OF LAWS — JURISDICTION — SHIPS ON THE HIGH SEAS. — The plaintiff's intestate was negligently killed while on the defendant's vessel on the high seas. The defendant was a resident of New Jersey, but the ship was registered in New York. *Held*, that the law of the owner's residence governs. *International Navigation Co.* v. *Lindstrom*, 123 Fed. Rep. 475 (C. C. A., Second Circ.).

The decision is based on two classes of cases: first, decisions granting a lien for supplies furnished in the port of registration; and second, decisions holding the registry merely *prima facie* evidence of ownership. The decisions as to maritime liens turn, not on the question of jurisdiction over the ship, but on the question whether the owner is present at the port of registration. *The Suliote*, 23 Fed. Rep. 919; *The Plymouth Rock*, 13 Blatchf. (U. S.) 505. The bearing of the second class of decisions is even less apparent. Although no case directly in point has been found, apparently the law of the port of registry has heretofore been supposed to control. See MINOR, CONFLICT OF LAWS, § 120. This also appears the better view for the reason that any interested party could then determine easily what law governed; that the governing law would not be subject to change by sales of the vessel made secretly or while it was abroad; and that the complicated questions resulting from the rule of the principal case where the several owners are residents of many jurisdictions could not then arise.

CONSIDERATION — FAILURE OF — RECOVERY OF MONEY PAID. — The defendant contracted to let his steamer to the plaintiff on the occasion of a naval review to be held in June or July, 1902, for a certain sum payable in advance. The plaintiff having paid the whole consideration, the review was indefinitely postponed. The plaintiff brought suit to recover back the money paid. *Held*, that the plaintiff cannot recover. *Civil, etc., Society* v. *General, etc., Navigation Co.*, 20 T. L. R. 10 (Eng., C. A.).

In deciding similar cases, several of which have arisen in consequence of the postponement of the coronation of King Edward, the English courts have relied chiefly upon two lines of decisions, holding, first, that there can be no recovery for uncompleted work upon the property of another if that property is accidentally destroyed, and second, that no recovery can be had for prepaid freight in consequence of the loss of the ship in which the goods were sent. *Appleby* v. *Myers*, 2 C. P. 651; *Saunders* v. *Drew*, 3 B. & Ad. 445. Neither of those principles is general law in this country. See *Butterfield* v. *Byron*, 153 Mass. 517; *Griggs* v. *Austin*, 20 Mass. 20. The reasoning of the court, therefore, does not apply in this country, but the result might well be sustained on other grounds. Inasmuch as there is no warranty on the part of the defendant that the review shall take place, nor any stipulation by the plaintiff that he shall be repaid if it does not, the peculiar nature of the contract, coupled with the fact that the money was payable in advance, seems fairly to imply that the risk was on the hirer.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — USE OF TRADING STAMPS. — A state statute prohibited the use of trading stamps to be redeemed in merchandise by any person other than the tradesman issuing them. *Held*, that the statute is void, as an unconstitutional infringement on personal liberty. *Young* v. *Commonwealth*, 45 S. E. Rep. 327 (Va.).

The exercise of the police power, in order not to infringe upon the liberty guaranteed to citizens by the Constitution, must bear some reasonable relation to the promotion of health, good order, or morals. *Ruhstrat* v. *People*, 185 Ill. 133. The regulation of such businesses as liquor-selling and butchering, which may, if unrestricted, be injurious to the public welfare, is within this power. *Slaughter-House Cases*, 16 Wall. (U. S.) 36. Such businesses as department stores, however, may not be prohibited under the police power; thus an ordinance forbidding the sale of meats where dry-goods are sold is unconstitutional. *Chicago* v. *Netcher*, 183 Ill. 104. The practice of giving trading stamps does not affect health or good order, nor does it contain such elements of chance as to be objectionable to public morals. *State* v. *Dalton*, 22 R. I. 77. Moreover, premiums given by tradesmen upon purchases are so fair a means of business competition that they cannot be prohibited by the legislature. *People* v. *Gillson*, 109 N. Y. 389. The giving of premiums by another person, in accordance with an agreement to redeem coupons issued by tradesmen, seems equally beyond the exercise of the police power. *People* v. *Dycker*, 72 N. Y. App. Div. 308.

CONTRACTS — DEFENSES — IMPOSSIBILITY OF PERFORMANCE. — The plaintiff's testator contracted to carry mails for the defendant government for one year at an agreed price. War intervening, no mails were supplied. When sued on the contract, the defendant relied upon impossibility of performance. *Held*, that as the carriage was not an impossibility the plaintiff may recover. *Estate of Muller* v. *Government*, 2 Natal Law Quarterly 56 (Sup. Ct., Cape Colony, Nov. 27, 1902).

Two American decisions similar to that in the principal case hold that when the authorities closed the schools on account of the prevalence of disease, they were liable in an action brought by teachers to recover the amount of their salaries. *Dewey* v. *School District*, 43 Mich, 480; *School Town, etc.* v. *Gray*, 10 Ind. App. 428. But performance of the contract would have menaced the health of the community on whose behalf the defendant contracted, and the view which excuses the non-performance of a contract when unforeseen conditions cause its performance to be attended with such extraordinary risk that no reasonable man would attempt to carry it out, seems more consistent with public policy, for the reason that the state cannot risk the loss of its citizens even to preserve inviolate the contracts of individuals. *Lakeman* v. *Pollard*, 43 Me. 463. Unless, however, the defendant's performance of the contract would seriously threaten the public welfare, mere inexpediency of performance would not seem to justify depriving the plaintiff of his contractual rights. On this ground the principal case may well be supported.

CONTRACTS — PAYMENT FOR DEFECTIVE PERFORMANCE AS WAIVER OF BREACH. — The defendant having been forced by circumstances to accept the plaintiff's delayed performance of a contract, objected to paying the contract price, but finally paid it in full, expressing a hope that the plaintiff would do "the fair thing" by him if he suffered damage as a result of the delay. *Held*, that the defendant has waived the right to recover damages for the breach. *Medart, etc., Co.* v. *Dubuque, etc., Co.*, 96 N. W. Rep. 770 (Ia.).

The acceptance of imperfect performance of a contract does not necessarily imply a waiver of the right to sue for damages for the breach. *Hansen* v. *Kirtley*, 11 Ia. 565. A waiver may fairly be inferred, however, from failure to object at the time of the acceptance, or from other evidence showing an intention to waive the default. *Cassady*

v. *Clarke*, 7 Ark. 123. If instalments falling due after default are paid, and continued performance is acquiesced in, the cases are in conflict as to whether the breach can be recouped in damages. *Shute* v. *Hamilton*, 3 Daly (N. Y.) 462; *The Isaac Newton*, Abb. Adm. (U. S. D. C.) 11. Where, as in the principal case, the goods are both received and paid for in full, the evidence of a waiver is even stronger, and the court apparently considers such facts conclusive. Authority upon the question is meager, but there seems to be no reason on principle why an express reservation of a right to sue for damages under these circumstances should not be effective. In the absence of express reservation, however, the present case is to be supported. *Reid* v. *Field*, 83 Va. 26.

COPYRIGHT — AUTHORSHIP OF NEWSPAPER ARTICLE. — The plaintiff sent to a newspaper an account of a current event. From the facts which the article contained a sub-editor of the paper compiled a paragraph which was substantially a new narrative and which was published in the paper. This paragraph, with slight alterations, was subsequently reprinted in a paper of which the defendant was editor. The plaintiff, having registered himself as owner of the copyright in the paragraph, demanded an injunction restraining the defendant from selling papers containing the paragraph. *Held*, that the plaintiff is not the author of the paragraph within the meaning of the Copyright Act. *Springfield* v. *Thame*, 89 L. T. 242 (Eng., Ch. Div.).

There is no copyright in news, but only in the manner of expressing it. *Walter* v. *Steinkopff*, [1892] 3 Ch. 489. The plaintiff here claimed the copyright in the paragraph as printed, not in the original composition. The question to be determined, therefore, was who was in the legal sense author of the paragraph. The decision of the court is in accordance with the decided abridgment cases in both England and America. The early English cases hold that an abridgment is no infringement, unless it is accomplished by a mere mechanical cutting down and is not the result of mental operations on the part of the abridger. *Dickens* v. *Lee*, 8 Jur. 183. The American cases hold that substantially to appropriate the labors of another is piracy, but they give to an abridger the protection afforded by the copyright act when the abridgment can fairly be said to be his creation and to possess the character of an original work. *Folsom* v. *Marsh*, 2 Story (U. S. C. C.) 100. It is clear, therefore, that the sub-editor, and not the plaintiff, is entitled to copyright the paragraph.

CORPORATIONS — DISTINCTION BETWEEN CORPORATION AND ITS MEMBERS. — An insolvent trader, through an agent, sold his business to a corporation, which he promoted for that purpose. The directors of the company were merely his instruments in carrying through the transaction, which divested him of his property and left him with creditors to a large amount. *Held*, that the transfer is void under the Bankruptcy Law as a fraud on the creditors. *In re Slobodinsky*, [1903] 2 K. B. 517.

Although the corporation in the principal case was promoted by the insolvent for the sole purpose of taking over his business in this way, and was entirely controlled by him through his tools, the directors, still by the English law it was a validly existent corporation. *Salomon* v. *Salomon*, [1897] A. C. 22. Consequently the transfer must be regarded as one between two entirely distinct persons. The court sets the transfer aside under the English bankruptcy rule that a transfer of property by an insolvent under such circumstances to another having knowledge of the facts is a fraud on the creditors. In doing this, they treat the corporation as a separate entity, but make use of the fact that the directors are mere tools of the insolvent to charge the corporation with notice of any fraud intended by him. The court thus reaches practically the same result that American courts generally reach in a more direct way by disregarding the fiction of the corporate existence in such cases and dealing with the real parties. *Bank* v. *Trebein Co.*, 59 Oh. St. 316.

DECEIT — RECOVERY FOR EXPRESSION OF OPINION. — The defendant, a Christian Science "healer," represented to the plaintiff, a patient suffering with appendicitis, that he could cure her by Christian Science treatment. The plaintiff took the treatment and suffered injury. *Held*, that the defendant is not liable in deceit for mere expression of opinion, but that it should have been left to the jury to find whether the representation was not one of fact. *Speed* v. *Tomlinson*, N. H., Sup. Ct., Oct. 6, 1903. See NOTES, p. 193.

EMINENT DOMAIN — ELEVATED STREET RAILROADS — INJURY TO ABUTTING OWNER. — The constitution of Illinois provides that private property shall not be taken or damaged for public use without compensation. The plaintiff, an owner of property abutting on the street used by an elevated railroad, sued the railroad company for the damage to his easements of light, air, and access caused by the construc-

tion of the road. *Held*, that the defendant is liable. *Aldis* v. *Union Elevated R. R. Co.*, 68 N. E. Rep. 95 (Ill.).

Elevated railroads are generally held liable on various grounds for injuries to abutting property. In New York they are considered an additional servitude upon the street, and so an illegal obstruction causing special injury to the right of an abutter to have the thoroughfare used only as a highway. They are also regarded as injuring his easements of light, air, and access, and all these injuries are held to be a taking of property which requires compensation. *Abendroth* v. *Manhattan Ry. Co.*, 122 N. Y. 1. Recent decisions, however, have confused the New York doctrine. *Cf. Muhlker* v. *New York & Harlem R. R. Co.*, 173 N. Y. 549. Illinois, however, has refused to treat the elevated structure as an additional servitude. *Doane* v. *Lake Street El. R. R. Co.*, 165 Ill. 510. But the principal case shows that it follows New York far enough to allow recovery to an abutter for injury to his easements of light, air, and access. Nor is this inconsistent with the earlier Illinois cases, for the easements in question are distinct from the abutter's right to an unobstructed thoroughfare, and may be infringed by a permanent structure which is nevertheless proper for the convenient use of the highway. *Calumet & Chicago Canal Co.* v. *Morawetz*, 195 Ill. 398.

Evidence — Declarations Concerning Pedigree — Bastardizing Issue. — Less than six months after a marriage a son was born. In a suit to perpetuate testimony, the husband deposed that prior to marriage he had never had sexual intercourse with his wife, and that soon after marriage she confessed to him that at the time of marriage she was with child by another man. The deposition was offered as evidence to prove that the child was a bastard. *Held*, that the evidence is admissible. *The Poulett Peerage*, [1903] A. C. 395. See Notes, p. 187.

Gifts — Adultery of Wife as Ground of Revocation. — A husband, at the solicitation of his wife, made to her a gift of certain property, and upon her subsequent elopement brought this action to recover it. The evidence tended to show that when the defendant accepted the gift, she not only had been guilty of adultery, but also contemplated a renewal of the illicit intercourse, which facts were unknown to the plaintiff. *Held*, that the plaintiff is entitled to equitable relief. *Evans* v. *Evans*, 45 S. E. Rep. 612 (Ga.).

Subsequent adultery of the wife does not invalidate a voluntary settlement. *Lister* v. *Lister*, 35 N. J. Eq. 49. A husband's right to revoke a gift must therefore be based on the wife's fraud in concealing certain facts at the time of the gift rather than upon the wrongful conduct itself. A concealment to be material, however, must be of something that the party was under some obligation to disclose. That obligation is derived from the confidential relation existing between husband and wife, although its extent is not determined by authority. The obligation should perhaps be limited to the disclosure of existing material facts — a wife's intention being one of those facts — since it seems unwise to require her to disclose past misconduct, if her intentions for the future are good. Whatever may be the effect of the wife's failure to disclose her antecedent misconduct in the principal case, the fact that she, in contemplation of subsequent adultery, persuaded her husband to give over the property, clearly entitles him to revoke the gift. *Evans* v. *Carrington*, 2 DeG. F. & J. 481.

Illegal Contracts — Contracts Collaterally Related to Illegal Transactions. — The defendant ticket-scalpers were selling the unused return coupons of excursion tickets to the Pan-American Exposition. These tickets showed on their face that they could lawfully be used for the return trip only by those persons who had used them for the trip to Buffalo. The plaintiff, a railroad issuing these tickets, brought the present bill to enjoin the defendants from selling the return coupons. *Held*, that the injunction, should be denied. *New York Central, etc., R. R. Co.* v. *Reeves*, 30 N. Y. L. J. 287 (N. Y., Sup. Ct.).

Many courts have held that the seller's knowledge of the illegal purpose of the buyer does not render illegal a contract of sale made to enable the purchaser to accomplish his end. *Delavina* v. *Hill*, 65 N. H. 94. By this view the principal case is sound; for the defendants themselves would be threatening no wrong to the plaintiff. The better view, however, seems to be that public policy requires such sales to be considered illegal as tainted with the unlawfulness of the buyer's intent. *Church* v. *Proctor*, 66 Fed. Rep. 240; *Graves* v. *Johnson*, 156 Mass. 211. In the principal case there would seem to be no question as to the defendants' knowledge of the fraudulent intention of the purchasers. The illegality of the contract being granted, the case would seem a proper one for an injunction, because the injury to the plaintiff would

appear irreparable on account of the impracticability of detecting the fraud in the case of each individual purchaser. *Cf. Lever* v. *Goodwin*, 36 Ch. D. 1. Such was the holding in an exactly analogous case decided in connection with the exposition at Nashville in 1897. *Nashville, etc., R. R. Co.* v. *McConnell*, 82 Fed. Rep. 65.

INSURANCE — WAIVER OF CONDITIONS OF POLICY BY AGENT. — The plaintiff's husband signed an application for a life insurance policy which stated that the policy should be accepted subject to the conditions therein contained, and should not take effect until the first premium was paid. Upon the delivery of the policy, the general agent of the defendant informed the plaintiff's husband that he might have thirty days additional time in which to pay the first premium, and that the insurance would go into immediate effect. The policy provided that "no agent has power to extend time for paying the premium." The plaintiff's husband was killed within thirty days, and before the first premium was paid. *Held*, that the defendant is not liable on the policy. *Russell* v. *Prudential Ins. Co. of America*, 73 N. Y. App. Div. 617.

For a discussion of the principles involved, see 12 HARV. L. REV. 503; 15 *ibid.* 575.

INTERSTATE COMMERCE — REGULATION — SHERMAN ANTI-TRUST ACT. — All the lumber manufacturers of a city agreed to refuse to sell to consumers who purchased any lumber from outside mills, some of which were situated in another state. *Held*, that since the effect of the agreement upon interstate commerce is only indirect, it is not in violation of the Sherman Anti-Trust Act. *Ellis* v. *Inman, etc., Co.*, 124 Fed. Rep. 956 (Circ. Ct., Dist. of Ore.).

Restraint of trade which is not interstate commerce is not within the prohibition of the Sherman Anti-Trust Act. *United States* v. *Knight, etc., Co*, 156 U. S. 1. No precise definition of interstate commerce, however, is afforded by the cases. An agreement the effect of which is directly to restrain sales between states — such as a combination of foreign coal producers and local dealers, for example — concerns interstate commerce and is forbidden by the Act. *United States* v. *Jellico, etc., Co.*, 46 Fed. Rep. 432. But if sales between the states are only indirectly restrained, as, for instance, by an agreement among local traders in imported live-stock, not to deal with other local traders, interstate commerce is not affected and the Act does not apply. *United States* v. *Hopkins*, 171 U. S. 578. The present agreement directly concerns local sales of local products, and affects interstate commerce merely indirectly and then only in the remote instance of customers who habitually buy part of their stock from foreign producers. Such agreements, it would seem, are rightly held not to be prohibited by the Act. *Cf. Dueber, etc., Co.* v. *Howard, etc., Co.*, 55 Fed. Rep. 851.

LEGACIES AND DEVISES — EXECUTORY DEVISE AFTER A FEE SIMPLE CONDITIONED ON FAILURE TO ALIENATE. — A testator devised property to his wife in fee, but if she did not dispose of it during her life or by will, to B in fee. *Held*, that the devise over is void. *Meyer* v. *Weiler*, 95 N. W. Rep. 254 (Ia.). See NOTES, p. 190.

LIENS — EQUITABLE LIEN THROUGH PAYMENT OF PREMIUMS ON INSURANCE POLICY BY BENEFICIARY. — The plaintiff, as one of several beneficiaries of a life insurance policy, had for some years previous to the death of the insured paid the premiums on the policy in order to keep it from lapsing. *Held*, that the plaintiff, as against the other beneficiaries, has an equitable lien on the proceeds. *Stockwell* v. *Mutual Life Ins. Co.*, 73 Pac. Rep. 833 (Cal.).

Equitable liens are sometimes raised aside from any agreement between the parties. It is generally recognized, for example, that, when one joint owner of certain property makes such repairs as are reasonably necessary for its preservation, an equitable lien upon the property is created. *Alexander* v. *Ellison*, 79 Ky. 148. Equity always seeks to prevent the unjust enrichment of one party at the expense of another, and it is upon this broad principle that such liens are based. A plaintiff claiming an equitable lien must, however, show himself deserving of such relief; consequently a stranger who officiously pays premiums on a life insurance policy acquires no standing in equity. *Meier* v. *Meier*, 88 Mo. 566. When, on the other hand, as in the present case, the premiums have been paid in good faith by one having some claim or color of interest in the policy, it would seem that in equity and good conscience he is entitled to relief in the form of an equitable lien on the proceeds. *Gill* v. *Downing*, L. R. 17 Eq. 316; *contra, Leslie* v. *French*, 23 Ch. D. 552.

MORTGAGES — CLOG ON EQUITY OF REDEMPTION. — The defendant mortgaged shares of a tea company to the plaintiff, and agreed to use his influence to have the plaintiff always thereafter employed as the company's broker, and he further agreed, in case any of the company's teas were ever sold through any broker other than the plaintiff,

that he would pay the plaintiff the amount of the commission which the latter would have earned had the sales been made through him. *Held*, that the agreement is a clog on the equity of redemption, and therefore void. *Bradley* v. *Carritt*, [1903] A. C. 253.

For a discussion of the principles involved, see 15 HARV. L. REV. 661.

PARTNERSHIP — NATURE OF STATUTORY PARTNERSHIP ASSOCIATIONS. — The plaintiff was a limited partnership association organized under the laws of Michigan, which gave it power to sue in the association name. The partnership filed a bill in a Federal court in New York for an injunction against the violation of a patent right. *Held*, that the plaintiff may maintain the bill under its association name. *Sanitas Nut Food Co.* v. *Force Food Co.*, 124 Fed. Rep. 302 (Circ. Ct., W. D. N. Y.). See NOTES, p. 194.

POST OFFICE — OFFENSES AGAINST POSTAL LAWS — USE OF MAIL FOR FRAUDULENT PURPOSE. — The postal laws provide for the punishment of any person who shall, in the execution of a fraudulent design, make use of the mails. U. S. Comp. St. 1901, p. 3696. *Held*, that a count in an indictment charging the defendant with having mailed on various days five hundred letters pursuant to a fraudulent scheme will be quashed for duplicity. *United States* v. *Clark*, 125 Fed. Rep. 92 (Dist. Ct., M. D. Pa.).

But one decision upon this point has been found. *United States* v. *Loring*, 91 Fed. Rep. 881. That case goes upon the ground that the execution of the fraudulent design is the offense contemplated by the postal laws, and that each mailing of a letter in consummation of the fraud is merely incident to the offense charged. This view is expressly repudiated in the principal case, and it would seem that the position there taken is sound. The provisions of the postal laws are evidently directed, not against the fraud, but against the use of the mails in connection therewith. It follows that each separate use of the mail in furtherance of the fraudulent design constitutes a distinct violation of the law. See *In re Henry*, 123 U. S. 372.

POWERS — GENERAL POWER OF APPOINTMENT BY WILL — RIGHTS OF CREDITORS. — The donee of a general power of appointment by will contracted to exercise it in favor of one who in return loaned him money. The donee of the power died insolvent, leaving a will which carried out his agreement. *Held*, that the rights of the appointee in the property subject to the appointment are postponed to those of the general creditors of the testator. *Beyfus* v. *Lawley*, [1903] A. C. 411. See NOTES, p. 189.

RECEIVERS — INTERFERENCE WITH RECEIVER'S POSSESSION. — The plaintiff and defendant were partners in business. On the application of the plaintiff a receiver was appointed and the partnership declared dissolved. The defendant set up a rival business under a similar name, and tried to induce employees of the old firm to leave and to enter his employ, and also attempted to secure a lease of a field used by the partnership business. A motion was made by the plaintiff for an injunction to restrain the defendant from interfering with the receiver. *Held*, that an injunction will be granted. *Dixon* v. *Dixon*, 89 L. T. 272 (Eng., Ch. D.). See NOTES, p. 196.

RECEIVERS — PERMISSION TO APPEAL. — The receiver of an insolvent corporation, at the instance of the majority of the proving creditors, applied to the court by which he was appointed and controlled for permission to take an appeal, at the expense of the insolvent estate, from a decree which retained within the lien of a mortgage valuable property belonging to the corporation. The mortgagee was also the largest unsecured creditor. *Held*, that the court will not give permission to appeal. *Cook* v. *Anderson Food Co.*, 55 Atl. Rep. 1042 (N. J., Ch.).

Whether or not a receiver shall be given permission to bring a suit lies wholly in the discretion of the court by which he is appointed and whose servant he is. *Wayne Pike Co.* v. *State*, 134 Ind. 672. In the present case, although the receiver requested permission to bring the appeal as receiver, the real struggle was between the mortgagee and the other unsecured creditors. If the appeal were taken and the decree reversed, the mortgagee, as secured creditor, would lose the mortgaged property, and, whether or not the decree were reversed, he, as unsecured creditor, would have to pay his share of the costs of litigation against himself. The court properly held that the mortgagee ought not to be forced in advance into a position in which he would have to contribute to the expenses of a suit against himself. Those creditors who desire the receiver to bring the appeal in his name might easily remove this objection by securing to him the costs of the appeal.

RESCISSION — FRAUD — PATENT TO PUBLIC LAND. — The defendant, by means of false representations and bribery, secured a patent from the United States to a quarter section of public land, but paid the highest price for which the land could be

sold under any existing law. The government was under no obligation to convey the title to any other person. The United States brought suit to cancel the patent. *Held*, that equity will give no relief. *Lynch* v. *United States*, 73 Pac. Rep. 1095 (Okla.).

The court in this case relies upon the principle that equity will not interpose to annul a conveyance, although obtained fraudulently, unless pecuniary damage to the complainant can be shown. That rule, however, is by no means universally accepted. *Williams* v. *Kerr*, 152 Pa. St. 560; *Harlow* v. *La Brum*, 151 N. Y. 278. Even granting that it is ordinarily sound, the peculiar circumstances affecting the disposal of public land would seem to justify an exception to it in cases of this character. The position of the government is entirely different from that of a private individual who is seeking to sell land at a profit. Its purpose is to open up land to settlement by proper persons at a price below the market value; and the amount charged is the least part of the real inducement for issuing its patents. See *United States* v. *Trinidad, etc., Co.*, 137 U. S. 160. Under the rule of the principal case, however, this policy of the government may regularly be frustrated by any swindler who is ready and willing to pay the legal price of the land. See *United States* v. *Pratt, etc., Co.*, 18 Fed. Rep. 708.

SALES — BILL OF LADING — LIABILITY OF ASSIGNEE FOR VENDOR'S BREACH OF CONTRACT. — The defendant purchased from the vendors of certain cotton a draft on the plaintiff, the vendee. The bill of lading of the cotton was attached to the draft. The vendee paid the draft and obtained the bill of lading. He later sued the defendant because the cotton was short in weight. *Held*, that the defendant is not liable. *Blaisdell, Jr., Co.* v. *Citizens' Nat'l Bank*, 75 S. W. Rep. 292 (Tex., Sup. Ct.).

This case repudiates a doctrine which originated in Texas and has had some following. For a discussion of that doctrine, see 16 HARV. L. REV. 292.

SET-OFF AND COUNTERCLAIM — SET-OFF OF CLAIM PURCHASED AFTER INSOLVENCY. — By statute the right to purchase claims against an insolvent, and to use them by way of set-off, ceased upon the filing of the petition for a receiver. After the reputed insolvency of a bank, but before the petition was filed, the defendant, being indebted to the bank, purchased a claim against it. The receiver subsequently brought suit on the debt. *Held*, that the defendant may set off the claim purchased. *Nix* v. *Ellis*, 45 S. E. Rep. 404 (Ga.).

The defendant's claim, since it was not one affected by the statute, would come within the generally recognized principle that claims may be purchased and set off. *Meriwether* v. *Bird*, 9 Ga. 594. A receiver takes property subject to all existing claims. *Van Wagener* v. *Paterson Gas Co.*, 23 N. J. Law 283. It would seem therefore that the receiver took subject to the defendant's right of set-off. Indeed a set-off, though it must be pleaded in bar, has been held so far to extinguish the debt that after its acquirement the debt can no longer be considered an asset. *Finnell* v. *Nesbit*, 16 B. Mon. (Ky.) 351. That the result reached works a hardship to the creditors of the insolvent is true, and in many instances transactions like the present are forbidden by statute. *Stone* v. *Dodge*, 96 Mich. 514; U. S. Comp. St. 1901, p. 3450. But in the absence of statute the principal case seems sound, and is in accordance with the weight of authority. *Moseby* v. *Williamson*, 5 Heisk. (Tenn.) 278; *Hawkins* v. *Whitten*, 10 B. & C. 217. There are some decisions *contra*. *Kennedy* v. *New Orleans Sav. Inst.*, 36 La. Ann. 1. But the cases usually cited in opposition are distinguishable, since they proceed upon some special fact from which the court finds that the debt due the insolvent was actually held in trust for the creditors. *Smith* v. *Hill*, 8 Gray (Mass.) 572; *Sawyer* v. *Hoag*, 17 Wall. (U. S.) 610.

STATUTORY CONSTRUCTION — PROVISIONS FOR NOTICE TO VOTERS. — A statute set a date as the meeting day for voters of street lighting districts, and provided for ten days notice. The plaintiff was present and voted, without protesting, at a meeting notice of which had not been posted ten days before. No voters were shown not to have been warned. On certiorari to review the proceedings, *Held*, that the plaintiff is estopped from questioning the regularity of the meeting. *Brown* v. *Street Lighting District, etc., of Woodbridge*, 55 Atl. Rep. 1080 (N. J., Sup. Ct.). See NOTES, p. 191.

SURETYSHIP — SURETY'S DEFENSES BASED ON EXTINGUISHMENT OF PRINCIPAL'S OBLIGATION. — The defendant's signature as co-maker upon a note was forged, and subsequently ratified. The defendant was in fact a surety, which fact was known to the plaintiff, the payee. Upon a renewal note the defendant's signature was again forged. *Held*, that the defendant is liable on the original note. *Central National Bank* v. *Copp*, 31 Banker and Tradesman 2019 (Mass., Sup. Ct., Oct. 22, 1903).

By ratifying his forged signature on the original note, the defendant by Massachusetts law became liable thereon as if the signature had been made by his authority. *Greenfield Bank* v. *Crafts*, 86 Mass. 447. The acceptance of a renewal note *prima facie* discharges the original obligation. But if the renewal note is void, the original obligation revives against both makers. *Williams* v. *Gilchrist*, 11 N. H. 535. And if, by the forgery of the maker, the renewal note is unenforceable against the party whose signature as co-maker has been forged, the payee may elect either to enforce it against the real maker or to treat it as void and to sue on the original note. *Leonard* v. *Congregational Society*, 56 Mass. 462. At the time of renewal the party whose signature on the renewal note was forged was, within the knowledge of the payee, surety on the original note. Had the surety actually been prejudiced by changing his position in reliance upon the satisfaction of the original obligation, he would be discharged. *Kirby* v. *Landis*, 54 Ia. 150. But since the surety has shown no actual prejudice, the creditor still retains his rights on the original obligation. *Hubbard* v. *Hart*, 71 Ia. 668.

Trade Secrets — Nature of Right Acquired by Purchaser. — The plaintiffs bought the formula and right to an unpatented medicine from the inventor, who covenanted not to reveal it to any other person. Afterward, however, he sold it to the defendants, who were innocent purchasers. They manufactured and sold it, and the plaintiffs brought suit against them for damages. *Held*, that the plaintiffs cannot recover. *Stewart* v. *Hook*, 45 S. E. Rep. 369 (Ga.).

At common law, an inventor has no absolute property in his invention. *Brown* v. *Duchesne*, 19 How. (U. S.) 183. So long as he keeps it secret, however, equity will restrain anyone who discovers it through fraud from using or disclosing it. *Morison* v. *Moat*, 9 Hare 241; *Tabor* v. *Hoffman*, 118 N. Y. 30. A purchaser from the inventor acquires the same right. *Vickery* v. *Welch*, 19 Pick. (Mass.) 523. The principal case, however, shows that protection is not granted against a *bona fide* purchaser for value, even where the vendor acted in fraud of the plaintiff's rights. This would seem to indicate that the right in a trade secret is merely equitable, and this view has found favor. *Cf. Chadwick* v. *Covell*, 151 Mass. 190. No case has been discovered allowing an action for damages, and all the decisions appear to have been in equity. If it is a common law right, the *bona fide* purchaser can be protected only on the theory that possession of knowledge includes title to it, for the reason that the common law, acting *in rem*, is powerless to take it away from one who has once acquired it. The theory that it is an equitable right, however, seems much simpler.

Witnesses — Privilege against Self-Incrimination. — A witness refused to answer certain questions on the ground that his answers might tend to criminate him. § 342 of the penal code reads as follows: "No person shall be excused from giving testimony . . . upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be received against him upon any criminal investigation or proceeding." Art. 1, § 6 of the state constitution provides that no person "shall be compelled, in any criminal case, to be a witness against himself." *Held*, that the defendant is justified in his refusal to answer. *Lewisohn* v. *O'Brien*, 176 N. Y. 253.

This decision overrules the previous New York rule. For a discussion of the principles involved, see 5 Harv. L. Rev. 346; 10 *ibid.* 120; 13 *ibid.* 296.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE PARTNERSHIP AS A LEGAL ENTITY. — A recent contributor to the Central Law Journal has made a valuable contribution to the discussion of this subject. *The Firm as a Legal Person*, by William Hamilton Cowles, 57 Central L. J. 348. Beginning with a short statement to the effect that the merchant world, like the law of the continent of Europe, regards a partnership as a distinct person, Mr. Cowles quotes from a number of cases in England and in the United States passages which state in plain terms that a partnership is an "artificial person," "a distinct entity," "as distinct and palpable an entity in the idea of the law as distinguished from the individuals composing it as is a corporation." A layman, or even a lawyer, not fully acquainted with the subject, might infer from these passages that there is no doubt of the position of the English and American courts. But Mr. Cowles well says that not only is the doctrine that the firm is a legal person denied in other jurisdictions, but that even in the very courts from whose opinions these passages are quoted cases can be found which repudiate the idea that a partnership is an entity. Mr. Cowles then discusses the cases in which contests have arisen between firm creditors and separate creditors as to the distribution of the partnership assets, when these assets were either divided by the partners among themselves without paying firm debts, or were transferred to one of the partners, or to the creditors of one or more of the partners.

The two views taken by the courts are illustrated by the leading cases which, on the one side, find such transactions invalid under the statutes against fraudulent conveyances, or, on the other, uphold the transfer on the theory that a firm creditor's rights against firm property can be worked out only by way of subrogation to the so-called partner's equity to have firm assets applied to the payment of firm debts, from which it is assumed to follow that if the partners have all released or lost this equity, the firm creditors have no standing. If the firm is an entity the first view must prevail, and the test of the application of the statute against fraudulent transfers will be the same as in the case of an individual. Mr. Cowles makes a judicious selection of cases to bring forward and discuss in the text of his article, and cites in the notes a large number of additional decisions. He condemns without reserve "the waiver-of-the-partners'-lien-subrogation-theory" first made prominent, if not invented, by Lord Eldon, and which, in our opinion, has been the greatest stumbling-block in the way of the development of our law of partnership into a system, rational, scientific, and harmonious with the conditions and requirements of the business world.

Mr. Cowles also applies the test of the personality of the firm to the cases involving joint debts of the partners which are not firm debts, and shows that in the United States the courts have rightly postponed such debts to the claims of the partnership creditors, while the English courts have put creditors of both kinds on the same footing. Mr. Cowles' conclusion is in these words: "The purpose in thus discussing the situation is not simply to show how unsatisfactory it is; nor to urge that the only remedy is to turn to the legislature and to codify this portion of the law, as England did in her partnership act of 1870; nor to urge that the courts should remedy it by judicial legislation; but to show that they have already done the legislating and that everything will clear up instantly if they will just admit it. Let them appropriate the word firm exclusively to indicate the collective artificial person; let them banish the word joint from the vocabulary of partnership; let them cease reiterating that the common law does not recognize the firm as a person, simply because that was true two hundred years ago, and, in spots, twenty-five years ago; and let them frankly

put these so-called subrogation cases on the shelf as relics of a past stage of the law."

We agree that while the law of partnership in the United States is in its present state of flux it would be a great mistake to attempt to codify it in the usual fashion, since that would produce a result even worse than the "crystallized chaos" of the English partnership act — worse because we have not only copied most of England's false conceptions as to the nature of the partnership relation, but also because of the muddling effect of the view of partnership real estate which is taken by the courts of the United States.

But we are not optimistic as to the probability of a general and open judicial recognition of the firm as a legal person within any reasonable time. It has taken over two hundred years to bring the courts to an occasional, hesitating and timorous, partial admission that the firm is an entity, an admission which from lack of courage they hasten to retract or qualify the next time the question comes before them. Mr. Cowles refers to the Supreme Judicial Court of Massachusetts as a court "specially strong in theoretical knowledge." That court has recently held that the title to the personal property of a partnership is not in the individual members. *Pratt* v. *McGuinness*, 173 Mass. 170. But the court shied at the word entity and said that the title is in the firm "as an entirety," which must mean the same thing, unless the court intended to create a tenure unknown to the common law, viz., an estate by entireties in personal property in analogy to estates by entireties in land granted to husband and wife. But the court could not have meant this, for the incidents of an estate by entirety are radically different from those of partnership tenure. It was this very court so "strong in theoretical knowledge," which perpetrated such decisions as *Howe* v. *Lawrence*, 9 Cush. 553, and *Bush* v. *Clark*, 127 Mass. 111. And the archaic doctrine of partnership as to third persons, when there is neither intent to form a partnership nor estoppel, seems to be still law in Massachusetts. See *Fitch* v. *Hamilton*, 13 Gray 468; *Pratt* v. *Langdon*, 97 Mass. 97, 100; *Brigham* v. *Clark*, 100 Mass. 230; *Potter* v. *Appleton*, 114 Mass. 114.

We have, however, no doubt that, unless arrested by unwise codification, the mercantile view of the nature of a partnership will eventually be adopted by all courts. In the meantime such articles as Mr. Cowles', and the assistance of like-minded lawyers, will be welcome aids to the opposition to the codification of this unripe branch of the law, and, if that cannot be averted, to an effort to make the codifying act a reformation and not a petrifaction. J. D. B.

Burden of Proof of Justification. — The degree of proof required for a conviction for crime forms the subject of a recent reported address. *The Doctrine of Reasonable Doubt*, by J. S. Burger, 11 Am. Lawyer, 440 (Oct. 1903). The author's conclusions are, in the main, sound, but in one respect a better discrimination would at least have promoted clearness, and might have avoided what is believed to be an error. After examining the cases Mr. Burger decides that all the defenses which are set up by the defendant in a criminal proceeding under a plea of not guilty ought to be disproved by the prosecution beyond a reasonable doubt; and he classes together for this purpose insanity, *alibi*, self-defense, and absence of malice in murder. It is submitted that in so doing he fails to distinguish between negative and affirmative defenses.

Clearly the rule laid down is correct as to those defenses which are by nature negative; *e.g. alibi*, which is merely an argumentative denial of the *corpus delicti*; *Commonwealth* v. *Choate*, 105 Mass. 451; or insanity, which, by the better view at least, is of importance as disproving a necessary element in crime, the criminal intent. *People* v. *Egnor*, 67 N. E. Rep. 906 (N. Y.); *Davis* v. *United States*, 160 U. S. 469. *Contra*, *State* v. *Lawrence*, 57 Me. 574. It seems equally clear, however, that defenses by nature affirmative must be established by the defendant by a preponderance of evidence. This is undoubted, for example, where the plea is former jeopardy or pardon. *Commonwealth* v. *Daley*,

4 Gray (Mass.) 209. And it is submitted that, in general, circumstances of justification, as for example self-defense or public authority, are of this nature, though they are set up under not guilty. The mode of procedure may well be explained on the ground that criminal pleadings, unlike those in civil actions, have always been required to be made orally and by the defendant in person, a practice which obviously precludes accurate affirmative pleading. When the defendant on an indictment for criminal assault, for example, sets up a plea of self-defense, it would seem that he neither denies the criminal act, nor the criminal intent, (which seems to be nothing else than the intent to do the criminal act.) But this depends, of course, on the definition of the criminal act. Is it, broadly, the striking of the blows; or is it the striking of the blows under any but certain special circumstances? If the former view be correct, justification is an affirmative defense; if the latter, it is negative. It would seem that the former view is the more logical. And that it is correct is pretty conclusively shown by the fact that, while the universal rule is that an indictment must state all the essential elements of the crime, an averment is never required that the act was done without justification.

With reference to the rather indefinite "malice aforethought" which is one of the elements of murder, and which is not the same as mere criminal intent, a further discrimination is perhaps necessary. When the defendant shows that the killing was done in resisting an unlawful arrest or under provocation, this is held to disprove malice. These are therefore negative defenses, and unless the prosecution disproves them beyond a reasonable doubt, the defendant can be convicted of manslaughter only. *Maher* v. *People*, 10 Mich. 212. It would seem that proof of absolute justification on an indictment for murder would even more clearly disprove malice. See HOLMES, COM. LAW, 62. When, therefore, in such a case, the defendant offers evidence of justification for this purpose, it would seem proper to charge that if such evidence raises a reasonable doubt the defendant cannot be convicted of murder. But since malice aforethought is no part of the crime of manslaughter, as to manslaughter justification is only an affirmative defense, and the defendant must be convicted of the lesser crime unless his evidence establishes the justification by a fair preponderance.

It must be admitted that many decisions and perhaps the majority of text-writers support Mr. Burger's position. 2 BISH. CRIM. PR., 4th ed., § 599; MCCLAIN, CRIM. LAW, § 316; 25 AM. & ENG. ENCYC. LAW, 2nd ed., 283, and cases cited. But there are enough cases which reach the opposite conclusion to warrant the view here suggested. *State* v. *Ballou*, 20 R. I. 607; *Weaver* v. *State*, 24 Oh. St. 584.

NEW TRIALS FOR ERRONEOUS RULINGS ON EVIDENCE. — Should an erroneous ruling on evidence be *ipso facto* ground for a new trial? A recent article by Professor Wigmore, showing the great practical importance of a wise answer to this question, should be read by judge, lawyer, and layman. *New Trials for Erroneous Rulings upon Evidence; a Practical Problem for American Justice*, by John H. Wigmore, 3 Columbia L. Rev. 433 (Nov., 1903). By the original English rule, in criminal as well as in civil cases, "an erroneous admission or rejection of a piece of evidence was not sufficient ground for setting aside a verdict and ordering a new trial, unless upon all the evidence it appeared to the judges that the truth had thereby not been reached." But in 1835 the Court of Exchequer announced that an "error of ruling created *per se* for the excepting and defeated party a right to a new trial," and this doctrine persisted as the law in all English courts until modified in civil causes by the Procedure Act of 1875. It has, moreover, come to be supported by the majority of jurisdictions in the United States. Two theories are advanced in support of the doctrine: that "a party has a legal right to the judicial observance of the rules of evidence, *per se*"; that "the judicial consideration of the weight of all the evidence, as a motive for refusing a new trial, would be a

usurpation of the jury's function." The first theory, says Mr. Wigmore, leads to the "exaltation of the ordinary rules of evidence, which are the mere instruments of investigation, into an end in themselves." The second fails to recognize that the jury has always acted under the supervision of the court, and leads to the curious result that the appellate court may overturn a decision of the jury as against the weight of the evidence, but may not consider a particular piece of evidence, so as to say that it would not have affected the same weight of evidence.

As to the practical results of the "Exchequer heresy," the writer forcefully shows that "it has done more than any other one rule of law to increase the delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litigious gambling." Reform is possible, but not by legislation alone; that has been tried in New York and New Jersey, and has failed. There must be, as in England, a "change in spirit." Particularly, says Mr. Wigmore, must the judges no longer be merely umpires at the game of litigation, mere automata. Likewise the "maudlin sentimentality of judges in criminal cases must cease."

The Fellow Servant Doctrine. — A recent article discusses the various attitudes of the United States Supreme Court on the liability of employers for the negligent injury of servants by fellow servants, and endeavors to expound an ultimate test that may best explain past decisions and guide the future. *The Fellow Servant Doctrine in the United States Supreme Court*, by Albert M. Kales, 2 Mich. L. Rev. 79 (Nov., 1903). The earliest theory, according to this writer, upon which the master's non-liability was rested by this court, was that the "servant assumed the risk of the negligence of his co-employee"; but as he obviously did not assume a risk in every case, this test gave way to one based upon the negligent employee's relation to the plaintiff. This in turn proving inadequate, was succeeded in later cases by the conception that the employer's liability must rest, not on the failure of the employee to assume the risk, but on the breach of a positive legal duty owed by the master. This duty is determined rather by the character of the act in the doing of which the negligence occurred than on the relation of the employees to each other. On this line of thought the court has often declared it to be the "duty of the master to use due care to furnish reasonably safe appliances and a reasonably safe place" in which to work. The writer then endeavors to show that in some cases the court has gone beyond this test in holding the master liable, though it has not expressed the principle on which it proceeded. And so Mr. Kales suggests an ultimate formula, which he considers to be supported by the actual decisions and to accord with the present attitude of the court. This formula requires from the employer due care to provide all permanent conditions of safety — as distinguished from those merely incidentally necessary — for his servants, and so when the negligence of a fellow servant occurs in respect to an act done in discharge of this duty, there is a violation of the master's duty. *Cf.* 16 Harv. L. Rev. 593. Mr. Kales' treatment is valuable for its exhaustive and accurate historical analysis of the decisions of the Supreme Court upon the fellow servant doctrine.

Subsequent Birth of Children as a Revocation of a Will. — Under this title the Virginia Law Register contains, in two numbers, a comprehensive and careful survey, by Mr. Marvin H. Altizer, of the statutes of pretermission which obtain in most American states, and of the cases which interpret these statutes. 9 Va. L. Reg. 473, 519 (Oct. & Nov., 1903). These provisions giving rights to a testator's children born after the will was made are discussed, first, with reference to the circumstances necessary for their operation, and, second, as to their effect. The principal questions arise under the first head, and per-

tain to the interpretation of the variously worded clauses limiting the operation of the statutes to cases where the testator has neither provided for, nor intentionally excluded, the after-born child. The great weight of authority holds any provision, however inadequate, sufficient under these clauses to prevent the operation of the statute, since the purpose of the statute is to protect only such children as are unintentionally omitted. This is very clear when the statute expressly declares that it is not to apply where there is an apparent intention to exclude. But in Pennsylvania, Maine, and Rhode Island, in which states the statutes are not thus expressly limited in application, they are construed as making of no avail an intention to disinherit the after-born child, and as requiring in every case some positively beneficial provision which shall be available to him as a present means of support. This construction the author criticises as not in accord with the purpose of the statutes. As to the evidence of intention to disinherit, which intention the statutes generally require to appear from the will itself, the courts have taken a liberal view, allowing the circumstances surrounding the making of the will to show such intention. Mr. Altizer criticises the Massachusetts doctrine that "parol evidence" is admissible for this purpose. By this, he evidently means merely parol evidence of declarations of intention by the testator. But the wording of the Massachusetts statute — "unless it appears that the omission was intentional" — would seem to justify the practice.

Erroneous Description of a Beneficiary in a Certificate of a Benefit Society. — In most jurisdictions statutes restrict the payment of death benefits of deceased members of benefit societies to particular persons, usually the husband, wife, betrothed, relatives, dependents, and adopted children. Within this list, subject to further restriction, but not to extension, by the by-laws of the society, a member has unlimited power to name his beneficiary. Occasionally, however, a person is erroneously or falsely described in the certificate, so as to appear within the statutory limits. A helpful discussion of typical cases of this sort may be found in a recent article. *Rights of Beneficiaries Erroneously or Falsely Described in Benefit Society Certificates*, by Cyrus J. Wood, 57 Central L. J. 383 (Nov. 13, 1903). The writer shows that courts are inclined to take into consideration the benevolent character and purpose of these societies and, in order to effectuate this purpose, liberally construe their by-laws and the statutes, giving a broad interpretation, for example, to such terms as "relatives," "families," and "dependents." So one improperly described in the certificate as a "relative" may obtain the benefit on proving dependency. This rule was not applied, however, in one case where the beneficiary, named as wife, became dependent by knowingly living with the member as his mistress. If, on the other hand, the beneficiary named cannot be brought within the prescribed limits, those who are within the rules may be awarded the benefit as against both the insured and the society. In short, a misdescription seems to be ignored, and the rights of all concerned are decided according to the benevolent purpose of the society with regard to the real relation of the appointed beneficiary to the deceased.

Action for Infringement of Right of Privacy Based upon Breach of Trust or Confidence. *Anon.* 57 Central L. J. 361.

Allowance for Compulsory Purchase. *Anon.* Discussing with approval the recognized practice of English juries and arbitrators of allowing more than the actual market value. 67 Justice of P. 517.

Burden of Proof. *Anon.* 67 Justice of P. 529.

Changes of Name. *Anon.* Discussing English decisions. 116 Law T. 26.

Conveyancing and Equity Cases of the Past Year. *John Indermaur.* Showing by a selection of cases the development of the law. 25 Law Stud. J. 224.

COVENANTS AGAINST ASSIGNING AND UNDERLEASING. *Anon.* 22 Law Notes (London) 330.

COVENANTS AS QUASI-CONTRACTS. *Louis L. Hammon.* Discussing the distinctions between the different classes of covenants. 2 Mich. L. Rev. 106.

DAMAGES UNDER "THE EMPLOYERS' AND WORKMEN'S ACT." *Anon.* 67 Justice of P. 494.

DEFECTS IN LAWS RELATING TO MARRIED WOMEN. *John Indermaur.* 116 Law T. 2.

DOCTRINE OF REASONABLE DOUBT, THE. *J. S. Burger.* 11 Am. Lawyer 440. See *supra.*

DUE PROCESS OF LAW. Part II. *Alton B. Parker.* 11 Am. Lawyer 431.

EMPLOYMENT OF CHILDREN ACT, THE. *Anon.* Discussing the recent English Act. 57 Justice of P. 541.

ENFORCEMENT OF ADMINISTRATIVE LAW, THE. *W. Harrison Moore.* 1 Commonwealth L Rev. 13.

ESTATE DUTY. *G. Thatcher.* Discussing liability under English Statutes. 116 Law T. 13.

EVIDENCE OF SIMILAR OFFENCES. *Anon.* 2 Can. L. Rev. 689.

FELLOW SERVANT DOCTRINE IN THE UNITED STATES SUPREME COURT, THE. *Albert Martin Kales.* 2 Mich. L. Rev. 79 See *supra.*

FIRM AS A LEGAL PERSON, THE. *W'm. Hamilton Cowles.* 57 Central L. J. 343. See *supra.*

FOREIGN VOLUNTARY ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. Part I. *Edson R. Sunderland.* 2 Mich. L. Rev. 112.

GROWING MASS OF CASE LAW, THE. *Anon.* Discussing the methods proposed by the committee of the American Bar Association for reducing the evil. 7 Law Notes (N. Y.) 144.

HUSBANDS AND WIVES AS WITNESSES. *Anon.* Discussing principally the effect of English statutes. 57 Justice of P. 543.

IMMUNITY OF MARRIED WOMEN FROM CRIMINAL LIABILITY. *Anon.* 67 Justice of P. 506.

INTERSTATE SERVICE OF PROCESS. *D. G. Ferguson.* Discussing the effect of acts passed by the first Commonwealth Parliament in Australia. 1 Commonwealth L. Rev. 18.

LAND TITLES ACT, THE. *Anon.* Discussing the expense of registering titles under the recent Canadian Act. 39 Can. L. J. 724.

LAW AND REASONABLENESS. *Le Baron B. Colt.* Discussing the chief modes by which our law has progressed towards ideal justice. 7 Law Notes (N. Y.) 148.

LIABILITY OF BANK ON A CERTIFIED CHECK, THE. *Glenda Burke Slaymaker.* 57 Central L. J. 367.

MENS REA. *Silas Alward.* 39 Can. L. J. 691.

NEW TRIALS FOR ERRONEOUS RULINGS UPON EVIDENCE. *John H. Wigmore.* 3 Columbia L. Rev. 433. See *supra.*

RIGHTS OF BENEFICIARIES ERRONEOUSLY OR FALSELY DESCRIBED IN BENEFIT SOCIETY CERTIFICATES. *Cyrus J. Wood.* 57 Central L. J. 383. See *supra.*

SETTLEMENT OF CHILD UNDER SIXTEEN. *Anon.* 67 Justice of P. 493.

SOME POINTS ON THE LAW OF MURDER. *Anon.* 67 Justice of P. 519.

STATUTES OF ONTARIO, THE. *N. W. Hayles.* A summary of the legislation of the year. 23 Can. L. T. 34.

STEEL CORPORATION CASES, THE. *James F. Tracey.* Discussing two New Jersey decisions, which hold that it is within the power of the United States Steel Corporation to issue mortgage bonds in order to retire a portion of its capital stock. 3 Columbia L. Rev. 470.

STOPPING PAYMENT OF A CHEQUE. *Anon.* Discussing liability of drawer to payee after payment is stopped. 39 Can. L. J. 726.

SUBSEQUENT BIRTH OF CHILDREN AS A REVOCATION OF A WILL. Part II. *Marvin H. Altizer.* 9 Va. L. Reg. 579. See *supra.*

SUPREME COURT OF THE UNITED STATES DURING THE FIRST HALF OF ITS EXISTENCE. *A. Inglis Clark.* 1 Commonwealth L. Rev. 3.

TAXATION IN THE PHILIPPINES. *W. F. Norris.* An outline of the system introduced by the Philippine commission. 15 Green Bag 538.

"THE CROWN" AS REPRESENTING "THE STATE." *Pitt Corbett.* Criticising the non-recognition of the state as a juristic person by the English law. 1 Commonwealth L. Rev. 23.

THE TUB-WOMEN *v.* THE BREWERS OF LONDON. *William A. Purrington.* Discussing the liability of trade and labor combinations. 3 Columbia L. Rev. 447.

TRUSTEE COMPANIES. *Robert C. Nesbitt.* Pointing out the difficulty of securing in England the services of trustees, and advocating the introduction of Trust Companies created by Act of Parliament. 116 Law T. 40.

VERBAL ALTERATION OF WRITTEN CONTRACTS IN MATERIAL PARTS. *Walter J. Lotz.* Discussing the discharge of sureties. 57 Central L. J. 403.

II. BOOK REVIEWS.

OUR ARCHAIC COPYRIGHT LAWS. An address by Samuel J. Elder of the Boston Bar. Delivered before the Maine State Bar Association. Augusta, Maine: Press of Charles E. Nash & Son. 1903. pp. 25. 8vo.

To secure the protection of our copyright laws an author must comply with certain conditions. (1) On or before the day of publication the title of the work must be delivered at, or deposited in the mail addressed to, the office of the Librarian of Congress. (2) Not later than the day of publication two copies of the work must be delivered or deposited in the same manner. (3) The protection of the copyright is lost in case the author fails to insert, in any copy of the work published, a notice, in a prescribed form, of the fact of copyright.

The major part of Mr. Elder's address is an adverse criticism of these three conditions. He argues that even after publication an author has a property right resulting from his labor, genius, and ingenuity, and that the copyright laws should be adapted to the protection of this right. He concludes that none of the three conditions are consistent with this fundamental object of copyright legislation. It is evident that the value of this argument depends upon the soundness of the initial proposition that an author has this property right. After reviewing the decisions and legislation Mr. Elder concludes that this right has been generally conceded.

This method of treating the question seems open to objection in several particulars. Since the constitutionality of the conditions can hardly be doubted, the question as to their propriety is addressed, not to the courts, but to the legislature, and an argument from the common law can have little value, unless as furnishing evidence of the recognition of a "natural right." But any argument that assumes the existence of a natural right is necessarily weak in that it opens at once all the vexed academic questions as to the existence and nature of such rights. Furthermore, in order to prove the existence of any particular natural right from its recognition, a recognition which is practically universal must be shown. This has never been accorded in the case of an author. A strong minority of the authorities have vigorously denied the existence of the right, and have insisted that the copyright privilege is in its essence a bounty which the state bestows to stimulate literary production, just as bounties are granted to encourage the production of certain vegetables, or the destruction of harmful animals. See DRONE, COPYRIGHTS, p. 2.

A simpler and more practical method of treatment than that employed by Mr. Elder might commence with an examination of the interests affected by copyright legislation. On the one hand, the author is entitled to compensation for his labor, while, on the other hand, the public is interested to secure the free circulation of valuable literature at reasonable cost. The wisdom of any con-

dition to copyright protection should be tested by its tendency to further these interests. It would not be unreasonable to make the depositing of the title and copies of the work conditions precedent to bringing suit, but a law making a failure to do so a forfeiture of the protection of the copyright act, has no tendency to further the interests of the public, and in many instances is disastrous to the author. To deprive an author of a valuable right for mere failure to insert a notice of copyright in one publication, also seems unjustifiable. The public interests would be fully conserved by a provision protecting one who had published copyright matter in good faith and with no notice of the copyright.

Whatever criticism may be made upon Mr. Elder's method of treatment, it is impossible to dissent from his conclusions, and it is gratifying to know that there is now on foot a movement, instituted by the American Publishers' Association and the American Copyright League, to secure more satisfactory legislation on this subject.

LEGAL MASTERPIECES, SPECIMENS OF ARGUMENTATION AND EXPOSITION, BY EMINENT LAWYERS. Edited by Van Vechten Veeder. St. Paul: Keefe-Davidson Company. 1903. 2 vols. pp. xxiv, 1–618, 619–1324. 8vo.

As he states in his preface, the editor of this collection has planned to "bring together from the whole field of legal literature specimens of the best models of the various forms of discourse and composition in which the lawyer's work is embodied." That his selections fulfil his aim, no one will question. That he has omitted some arguments or judgments which might well have a place in such a collection, is indisputable. But in order to bring such a collection within the compass of two volumes some selection was essential, and the selection made by the editor has much in its favor.

The work may profitably be compared with a somewhat similar collection made in 1881 by William L. Snyder of the New York Bar. Mr. Snyder's work was, however, somewhat more limited in scope, as its title, "Great Speeches by Great Lawyers," sufficiently indicates. Naturally, there was no place in it for judicial opinions, and such legal masterpieces as some of the opinions of Lord Mansfield, of Chief Justice John Marshall, and of Lord Stowell, which Mr. Veeder prints, were perforce omitted. Both editors agree in selecting arguments of Daniel Webster, Charles O'Conor, Jeremiah S. Black, David Dudley Field, William M. Evarts, Thomas Erskine, and John Philpot Curran. In the case of three of these, O'Conor, Black, and Curran, the argument selected is the same. In Mr. Veeder's book we find the famous opinion of Alexander Hamilton on the constitutionality of a United States bank. We find, too, among others omitted from Mr. Snyder's book, arguments by Horace Binney, Benjamin R. Curtis, Wendell Phillips, and also opinions by Lord Bowen, and arguments by James C. Carter which have been made since 1881. In "Great Speeches by Great Lawyers" we find, on the other hand, arguments by Patrick Henry, William Pinckney, William Wirt, William H. Seward, and Rufus Choate, none of which appear in the more recent book.

It should be noted that the two editors worked on somewhat different plans: Mr. Snyder selected single speeches from the works of twenty-five different lawyers. Mr. Veeder has confined himself to the works of twenty men, but from more than half he has printed two or more selections, thus giving a more comprehensive idea of the lawyer's power. Mr. Snyder has in each instance prefixed to the speech selected an analysis, and he has also divided the speeches themselves by headings in the text. His introductory notes are for the most part brief, and confined to the circumstances of the particular case.

Mr. Veeder's editorial work deserves very high praise. To the whole collection he has prefixed an interesting and instructive study of forensic argument. At the beginning of the work of each jurist is placed a short biography, followed by a lengthy and careful criticism of that jurist's life, work, and influence. It is a most excellent book for the library of any person interested in prose literature.

ADDRESSES AND PROCEEDINGS AT THE DINNER TO MR. JUSTICE JOHN MARSHALL HARLAN, given by the Bar of the Supreme Court of the United States, at Washington, December 9, 1902. Edited by the Executive Committee. New York: Cameron & Bulkley. 1903. pp. 80. 4to.

On December 10, 1902, Mr. Justice Harlan completed his twenty-fifth year on the Bench of the Supreme Court of the United States, and at a dinner given him by the Bar of the Supreme Court over two hundred and forty members, representing nearly every state in the Union, together with the President of the United States, and other guests of national prominence, assembled in recognition of Mr. Harlan's long and distinguished judicial service. By request of those present, and of many who were unable to attend, a full account of the proceedings at the dinner has been published in handsome and suitable form. The speakers in honor of the occasion were President Roosevelt, ex-Attorney-General MacVeagh, Mr. Justice Harlan, Chief Justice Fuller, Mr. Justice Brewer, Senator Hoar, Sir Edward Blake, Hon. Alexander Pope Humphrey, Ass't Attorney-General James M. Beck, and R. Ross Perry. These speeches compose the bulk of the volume, and form a wholesome and well-merited tribute to Mr. Harlan, as a soldier, friend, citizen, and judge. In the last respect, also, they are of peculiar interest, since the speakers wisely felt that they could give Mr. Harlan no higher praise than by explaining the full significance of the office which he has so well filled. Thus they furnish an explanation of the purpose for which the Supreme Court exists, its great power for good or evil, and what the quality of its judges must be, in order that they may perfectly justify the confidence which the nation places in them. Nor is it merely in this respect that the speeches are worthy of attention, for, in addition, they show us, through their outline of Mr. Harlan's character, that the nation's confidence is not misplaced. The book is a fitting testimonial to one who during a long life has served his country well. If it shall further operate to give us yet deeper faith in our chosen judges, the book will serve a double purpose.

THE MASSACHUSETTS BUSINESS CORPORATION LAW OF 1903. Covering private business corporations, excepting financial, insurance and public service corporations. By Prescott F. Hall. Boston: William J. Nagel. 1903. pp. lxii, 353.

The modern and liberal provisions of the new Massachusetts Business Corporation Law wisely give a much greater freedom of corporate organization and management than existed under the previous legislation, but without the loose and undesirable features found in the laws of some other states. The passage of this law will mark a new era in the development of corporate enterprise in this state. Under these conditions a practical and convenient working manual of the law is almost a necessity. This need the present volume fills in a very satisfactory manner.

After briefly sketching the history of corporation legislation in Massachusetts, the author makes a tabular comparison of the important provisions of the laws of those states in which corporations are chiefly organized, including the laws of Massachusetts, and then takes up the Act of 1903. This he considers section by section, discussing each provision fully and carefully, and giving a very complete citation of cases. In addition to the Act of 1903, certain other portions of the statutes affecting business corporations are printed, and the cases bearing upon them collected. The writer thus brings into readily accessible form the substance of the Massachusetts law governing business corporations. The book closes with a collection of the forms needed for compliance with the various requirements of the act, and of other forms of importance to incorporators, particularly including numerous suggestions of standard clauses declaring the powers and purposes of corporations. As will be readily seen, this manual will prove of considerable value in solving the many legal questions that will often arise in the forming and management of business corporations under this new Massachusetts law. W. H. H.

THE ESSENTIALS OF A WRITTEN CONSTITUTION. By Harry Pratt Judson. Chicago: The University of Chicago Press. 1903. pp. 43. 4to.

In this pamphlet the author points out that every complete constitution deals with four subjects: the social state, *i. e.* the whole community; the political state, *i. e.* that portion of the community which has political power over the whole; the government; and the amending process. He then proceeds to contrast and comment upon the provisions, as to these matters, incorporated into the charters which now in one form or another constitute the organic law of nearly all civilized nations. The pamphlet is valuable as giving in small compass a comprehensive view of the outlines of constitutional government. It is also valuable since it causes the peculiar features of the United States constitution, which is generally used by the author as a basis of comparison, to assume added distinctness and meaning in the mind of the reader.

COPYRIGHT IN CANADA AND NEWFOUNDLAND. Rules and Forms for Copyright Registration in Canada; together with the Copyright Laws of Canada, Newfoundland, New Brunswick, Nova Scotia, and Prince Edward Island. Prepared by Thorvald Solberg, Register of Copyrights. Bulletin No. 6. Washington: Government Printing Office. 1903. pp. 126. 8vo.

A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, which rest upon the Legislative Power of the States of the American Union. By Thomas M. Cooley. Seventh Edition. By Victor H. Lane, Professor of Law in the University of Michigan. Boston: Little, Brown & Co. 1903. pp. cxxiii, 1036. 8vo.

REPORT OF THE FIFTEENTH ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION, held at Hot Springs, Virginia, August 21, 22, and 24, 1903. Richmond, Va.: Everett Waddey Co. 1903. pp 432. 8vo.

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by William Mack and Howard P. Nash. Vol. VIII. New York: The American Law Book Company. London: Butterworth & Co. 1903. pp. 1145. 4to.

ANNUAL REPORTS OF THE DEPARTMENT OF THE INTERIOR. Vol. I. Report of the Commissioner of Education. 1902. Washington: Government Printing Office. 1903. pp. cxii, 1176. 8vo.

CASES ON CRIMINAL LAW. Vol. II. By William E. Mikell, Professor of Law in the University of Pennsylvania. Philadelphia: International Printing Co. 1903. pp. 505–983. 8vo.

HISTORICAL INTRODUCTION TO THE ROMAN LAW. By Frederick Parker Walton. Edinburgh and London: William Green & Sons. 1903. pp. xi, 256. 8vo.

THE ORGANIZATION AND CONTROL OF INDUSTRIAL CORPORATIONS. By Frank Edward Horack. Philadelphia: C. F. Taylor. 1903. pp. 207. 8vo.

HARVARD

LAW REVIEW.

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THE LAW OF THE PUBLIC CALLINGS AS A SOLUTION OF THE TRUST PROBLEM. II.

IV.

IT may be objected that in the case of most of the public service companies which have been brought forward for examination thus far in this discussion, a characteristic fact has been that the corporation in question has enjoyed some privilege or other from the state. It is quite true that eminent domain, or at least use of the streets, may be found in many of the examples cited; while aid out of taxation and even actual operation by the state, may be fastened upon in certain instances. The question thus arises whether, after all, the public employments extend further than the public privileges; whether virtual monopoly can give rise to a public calling, if the state has had no hand in the establishment of the situation.

The question is pertinent. An examination of the limitations under which these various privileges are granted under our constitutional system ought to give the answer. Under that system these extraordinary powers of government can only be exercised for public purposes, otherwise there will result a taking of private property for private use, which cannot with us be due process of law. Upon this principle, it is submitted that in the usual case the right of eminent domain cannot be granted to any business corporation unless it be a public service company, otherwise

there will not be that public purpose which is necessary to justify the taking. In the same way state aid cannot be extended to a commercial enterprise unless it be a public calling, for there will not be the public purpose necessary in taxation. It is true that the laws governing these matters show minor variations upon these points, but it is asserted with confidence that these considerations are at the basis of these rules.

The proof of this contention may be found in explanatory statements by various judges in such cases, making clear the grounds upon which they decide whether the grant of these special privileges is justifiable or not. Township of Burlington *v.* Beasley[1] is one such case. The issue was whether a series of bonds was valid under the state constitution. These bonds had been issued to aid the construction and completion of a steam custom grist mill within the township. The law empowered the execution of bonds for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water power by donation thereto or taking stock therein, or for other works of public improvement.

Mr. Justice Hunt in delivering the opinion of the court said in part: "The mill was a steam mill. Does such an establishment fall within the description of 'other works of internal improvement'? It would require great nicety of reasoning to give a definition of the expression internal improvement which would show that the means of transportation were more valuable to the people of Kansas than the means of obtaining bread. It would be a poor consolation to the people of this town to give them the power of going in or out of the town upon a railroad, while they were refused the means of grinding their wheat. The Statute of Kansas upon the subject of grist mills is based upon the idea, and, indeed, upon the declaration, that all grist mills are public institutions. In c. 65 of the Statute of 1868, p. 573, it is thus enacted: 'All water, steam or other mills, whose owners or occupiers grind or offer to grind grain for toll or pay are hereby declared public mills.' Regulation is then made for the order in which customers shall be attended to, the liability of the miller, the rates of toll. Under our recent decision in Munn *v.* Illinois, and the other cases upon kindred subjects, it would be competent to the legislature of Kansas, to regulate the toll to be taken at these mills."

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[1] 94 U. S. 310.

It is plain that this is a close case when it comes down to final adjudication. It is true that it is indispensable that the people of Kansas should have the means of obtaining bread, but so is it necessary that they should have the means of getting meat. Purveying to a public need does not make a calling public, for most businesses do that to a degree. It must therefore be the conditions surrounding the vending that affect the employment with a public interest. Where there is virtual competition the state has no function to interfere; it is only where there is virtual monopoly that the state may regulate the service. Upon the whole that is the basis upon which this opinion is founded. It holds by way of argument that it would be competent for the legislature to regulate the toll to be taken by these mills; therefore it argues that the establishment of them is a public purpose, treating these matters as all one legal problem.[1]

A much more obvious public service is the irrigation system; so obvious indeed that the propriety of state aid to such an undertaking has never been doubted. In Cummings *v.* Hyatt,[2] it was contended that the act under which the parties proceeded and succeeded in procuring the authorization of the bonds in question was unconstitutional and void in that it sought to apply private property to a private use; that the taxation of property in the township to pay the principal and interest of the bonds would work a taking of the property of citizens without due process of law; and that the contemplated irrigating ditch was not a work for the benefit of the public in such a sense as to warrant treating it as an internal improvement.

But the answer of Chief Justice Harrison to that contention was unequivocal; he said in brief: "It must be concluded that it has been established by both legislative and judicial determination that the use, in contemplation of law and designated thereby, was a public one, and with the further considerations that all members of the public within the range of the operations of the work might demand and command service by the company by payment of the usual and customary rates for such service, and that the company was of such a nature as would subject it in its transactions to

[1] In effect the following cases, among others, hold grist mills to be in public calling: Blair *v.* Cumming County, 111 U. S. 363; Boston Mill Corp. *v.* Newman, 12 Pick. 467; Trader *v.* Merrick County, 14 Neb. 327; Scudder *v.* Trenton Falls Co., 1 Saxt. Ch. 694.

[2] 54 Neb. 35.

legislative control, — it was not improperly classed as an internal improvement and entitled to the rights and privileges of such a work."

That the business of the irrigation company is public in its nature appears from every test. The supply of water available is limited by nature, the cost of the construction of the works is beyond individual enterprise; when the system is established the applicant will have no alternative, he has not even the opportunity to provide for himself. Since this is the situation the public interest requires that such works should be made practicable by eminent domain; and the situation may even be such that some subsidy from the state may be necessary to induce the promotion of the enterprise. There are two tests therefore: first, whether the purpose is public, a matter of law; second, whether state aid is necessary, a matter of judgment.[1]

The development of natural resources often is of such public interest in the sense that the term is here employed, as to require state regulation to prevent those in control from exploiting their natural monopoly. If at the outset the petroleum industry had been made the subject of special legislation, our recent industrial history might not have proved such interesting reading. Because of the peculiar conditions surrounding the transportation of oil by the extension of the pipe line systems, virtual monopoly in that business was the inevitable result. Those persons who had the upper hand in those regions therefore avoided bringing these issues to public notice by carrying out their plans without appeal to the state.

In West Virginia, however, the legislature at an early date authorized eminent domain, so that the courts were confronted with the necessity of deciding whether the construction of a pipe line was a public purpose. In West Virginia Co. *v.* Volcanic Co.,[2] Mr. Justice Moore said upon that point: "It has been decided time and time again, and is therefore settled by the best authority, that the construction of railroads, turnpikes, canals, ferries, telegraphs, wharves, basins, etc., constitutes what is gen-

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[1] In effect the following cases, among others, hold irrigation companies to be in public calling: Fallbrook District *v.* Braddley, 164 U. S. 112; Lux *v.* Haggin, 69 Cal. 255; Land Creek Co. *v.* Davis, 17 Col. 326; Slosser *v.* Salt River Co., 65 Pac. Rep. 332; Paxton Co. *v.* Farmers' Co., 45 Neb. 884; Umatilla Co. *v.* Barnhardt, 22 Ore. 389; Irrigation Co. *v.* Vivian, 74 Tex. 170.

[2] 5 W. Va. 382.

erally known by the name of internal improvements, and gives occasion for the exercise of the right of eminent domain. And other measures of general utility in which the public at large are interested, and which require the appropriation of private property, are within the power where they fall within the reasons underlying the cases mentioned. The charter granted to the West Virginia Transportation Company by special enactment of the legislature, shows that the object was to construct a line for the transportation of petroleum. The charter also established the maximum charges the company should make for transportation of oils. I cannot see the propriety of admitting a railroad or canal or aqueduct to be an internal improvement, and declare this tube highway not to be." [1]

It is not pretended that within the narrow compass of this article the whole of the constitutional law upon these subjects may be set forth with any accuracy of detail. What is contended is that this distinction between the public calling and the private calling is the key to the situation. Not unless the given business is by its nature affected with a public interest can the legislature give to it aid from the public treasury; not unless the work is to be of service to the public as a whole, will the courts sanction the exercise of eminent domain.

Public necessity, it is clear, must be proved in every case, but public service must be shown also; unless the managers of the enterprise undertake to serve all who apply upon reasonable conditions, the public have no interest in the promotion or conduct of the enterprise, its success or failure. An unusual decision in point is the case of Evergreen Cemetery Association *v.* Beecher,[2] which arose out of a complaint asking leave to take land for burial purposes by the right of eminent domain.

In sustaining a demurrer to the petition, Mr. Justice Pardee drew this distinction: "It is a matter of common knowledge that there are many cemeteries which are strictly private, in which the public have not, and cannot acquire the right to bury. Clearly the proprietors of these cannot take land for such continued private use by right of eminent domain. There is no allegation that the land which it desires to take for such enlargement is for the public

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[1] There is no reason to suppose, therefore, that the pipe line companies are not in public calling: West Va. Pipe Line Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 604. Compare the situation of the electrical subway companies, Bush Electric Co. *v.* Consolidated Subway Co., 15 N. Y. Supp. 81.

[2] 53 Conn. 551.

use in the sense indicated in this opinion. It is a public use only if all persons have the same measure of right for the same measure of money." [1]

All these considerations are most suggestive; indeed, one is led by them to an entire inversion of the common statement of the relation between the existence of public privileges and the establishment of public employment. It is common to argue that because a certain business has had a certain privilege granted to it, the consequence follows that the business is put by the courts in the class of public callings. But the real truth of the matter seems to be in the opposite statement, that no business can be granted a privilege under our constitutional system unless it is a public calling. This is because the conditions which permit competition or produce monopoly are altogether external matters of fact with which, when accomplished, the law must deal in one way or another. The difference between public calling and private calling is inherent in the nature of things.

V.

It is now possible to discuss the general problem without the confusion due to the complicating circumstance of state aid. That may be now put aside as unessential to the final determination. The case may be put of an actual monopoly where there is no legal privilege whatsoever. That case is Munn *v.* Illinois.[2] Any discussion of the foundations of our industrial relations must begin with that decision; since it is recognized that this case has within its view all public duties and all private rights which are established under our system of government. Upon the right understanding of this accommodation of private rights to public duties depends the true conception of our general theory of the function of state regulation.

The facts of the case are worth careful examination. The General Assembly of Illinois in 1871 had passed a statute which provided a maximum rate beyond which no person should be charged for the storage of grain in public elevators. The firm of Munn & Scott refused to obey the act, and accordingly were fined. They

[1] These cases, among others, hold in effect that the cemeteries are public service companies: Oakland Cemetery *v.* St. Paul, 36 Minn. 529; *Re* Deansville Cemetery Ass'n, 66 N. Y. 569; Henry *v.* Trustees, 48 Oh. St. 671; Cemetery Ass'n *v.* Redd, 33 W. Va. 262.

[2] 94 U. S. 113.

appealed the case from court to court until the Supreme Court of the United States was reached. The Supreme Court confirmed all the decisions which had been given below and decided against the defendant. The points to be noted are these: the elevator of Munn & Scott stood upon land bought by them by private treaty; they had no privileges in the public streets; they had no aid from the public treasury; they were not even incorporated. Here, then, is a case that raises the question without complication.

As a general problem, Mr. Justice Waite discusses it: "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise *De Portibus Maris*,[1] and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control."

This, then, is our constitutional law. Yet the sweeping principles laid down in this case of Munn *v.* Illinois must be employed with the greatest caution; otherwise there is danger that all businesses may be dragged into the net. What businesses, then, are so affected with a public interest that they are made of such public consequence that the public has an interest in their control? Profession of a willingness to serve the public, it must be plain, is not the sole test; for that would include all the small shops as well as the great exclusive industries. Attempts to enforce public duties in respect to the operation of private businesses must always fail by virtue of the guaranties of our constitutions; for although it is true as an abstraction that absolute property rights

[1] 1 Harg. Law Tr. 78.

cannot exist in organized society, yet by comparison with the qualified rights in public employment the rights protected in private business seem complete. Munn *v.* Illinois therefore involves the distinction between the regulation permitted in public calling and the police allowed in private calling.[1]

The only qualification upon the full acceptance of Munn *v.* Illinois is a late case in the same court, Cotting *v.* Kansas City Stockyards Company.[2] In 1897 the state of Kansas passed a statute entitled, An Act defining what shall constitute Public Stockyards, defining the duties of persons operating the same, regulating all charges thereof, and providing penalties for violations of the act. It was proved that if the capital stock of the Kansas City Stockyards Company were taken after deducting therefrom the portion which represented property not used for stockyard purposes, the return which would be left to the stockholders upon their investment would be only 4.6 per cent, if the rates fixed by the statute were enforced. For this, among other reasons, the legislation was held unreasonable and so unconstitutional.

Mr. Justice Brewer in the opinion takes various distinctions. He begins by reciting the paragraph from Munn *v.* Illinois just quoted; he continues: "Tested by the rule laid down in Munn *v.* Illinois, it may be conceded that the state has the power to make reasonable regulation of the charges for services rendered by the stockyards company. Its stockyards are situated in one of the gateways of commerce, and so located that they furnish important facilities to all seeking transportation of cattle. While not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and therefore must be considered as subject to governmental regulation. But to what extent may this regulation go? Is there no limit beyond which the state may not interfere with the charges for services of those who while not engaged in such service have yet devoted their property to a use in which the public has an interest? And while in the present case by the decisions heretofore referred to they cannot claim immunity from all state

[1] The following decisions among many others are based upon Munn *v.* Illinois: Budd *v.* New York, 143 U. S. 547; Davis *v.* State, 68 Ala. 58; Leep *v.* Railroad, 58 Ark. 416; White *v.* Canal Co., 22 Colo. 198; Breechbill *v.* Randall, 102 Ind. 528; State *v.* Edwards, 86 Me. 305; Belcher *v.* Grain Elevator, 101 Mo. 192; State *v.* Gas Light Co., 34 Oh. St. 572; Baker *v.* State, 54 Wis. 368.

[2] 183 U. S. 79.

regulation, they may rightfully say that such regulation shall not operate to deprive them altogether of the ordinary privileges of others in mercantile business."

The admission in this case that such a situation is peculiarly affected with a public interest so that such regulation as the exigency requires is proper, is enough. Differences exist between different cases, and it may be granted that in the actual case a return of 4.6 per cent on the investment is too little. The extent to which a business is public is a matter of law to be determined by the courts upon the application of their own tried tests to the situation. Whether a business is public or not depends upon the situation of the general public with respect to it. Are there enough of such purveyors to serve the public? If so, there will be virtual competition; if not, there will be virtual monopoly. In these cases of the grain elevator and of the stockyard, experience shows that in a given community there are not usually competitive conditions; monopolistic conditions generally prevail. It is not by accidental coincidence that they prevail. They prevail by natural limitation. The facts are that in any given community the plots of ground upon which these businesses may be conducted with convenience and efficiency are few and concentrated. In the case of the Chicago elevator those are the lots which both border upon the river and are adjacent to the terminals; in the case of the Kansas City stockyard the only available lands lie within the network of the railroads entering the city. In this essential particular the cases are alike; and they should therefore be treated alike.[1]

Barrington *v.* Commercial Dock Company[2] bears out this contention. The appellant was the owner of a wharf situated upon navigable water in the city of Tacoma, not located, however, upon any highway. The respondents were owners of the steamer Cricket, a passenger steamer plying between the cities of Tacoma and Seattle. They instituted this action for the purpose of compelling the appellant to permit them to use its wharf as a landing-place. Vessels of a similar character in competing business with the steamer Cricket were permitted to use the dock. The only statute gave a right to erect wharves upon navigable waters and

[1] *Cf.* Chicago R.R. *v.* Minnesota, 134 U. S. 467; Spring Valley Co. *v.* San Francisco, 82 Cal. 286; Pensacola R. R. *v.* Florida, 25 Fla. 310; Wellman *v.* Railway, 83 Mich. 592; Delaware R. R. *v.* Stockyard Co., 45 N. J. Eq. 50.

[2] 15 Wash. 170.

to charge wharfage. The appellant therefore contended that the wharf was its private wharf, and that it had therefore the right to determine for itself with whom it would do business.

Mr. Justice Gordon founded his argument upon these propositions: "When wharves belonging to individuals are legally thrown open to the use of the public, they become affected with a public interest. We think that in determining the character of the appellant's wharf, regard should be had to the use to which it has been devoted rather than its private ownership, and that upon the facts found the position of the appellant cannot be maintained. As well might the proprietor of a stagecoach claim the right to discriminate upon the ground that the property employed in his business was private property. The doctrine, if maintained, would tend to promote and further monopolies which it is not the policy of our law to favor." [1]

This commanding position is always a badge of public calling, because it gives the upper hand. The most extreme case of this sort is Nash *v.* Page.[2] That case was a controversy between the proprietors of ten of the tobacco warehouses in the city of Louisville, and the appellants, twenty-seven in number, who were dealers in tobacco. It appeared that the appellants had been denied the right to make purchases of tobacco at the warehouses of which the defendants were the proprietors. Accordingly, they had applied to the chancellor for an injunction asking that these warehousemen be enjoined from refusing them permission to make purchases at their several warehouses, and from rejecting their purchases when making the highest bids for the tobacco offered, upon the payment of such fees as were charged other buyers. The refusal was due to an attempt to restrict dealings to members of the Board of Trade.

The opinion of Mr. Justice Pryor is one of the most significant on this subject: "Since the formation of the state government, the sale of this great staple has been fostered and protected by legislation. Such warehouses have always been regulated by law, for the benefit of the producer as well as those who are proprietors of these warehouses, and the latter have assumed an obligation to

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[1] The following cases among others hold that such companies are in public calling: Robertson *v.* Guilder, 69 Ga. 340; District *v.* Johnson, 1 Mackey 51; Aiken *v.* Eager, 35 La. Ann. 567; Steamship Co. *v.* Elevator Co., 75 Minn. 312; Buffalo *v.* Railway, 39 N. Y. Supp. 4; Ryan *v.* Terminal Co., 102 Tenn. 119.

[2] 80 Ky. 539.

the public which exists as long as they continue public warehousemen. It is a conceded fact that more than five millions in value of tobacco annually finds its way from the producer to the warehouses in that city. The greater part of this product is grown within the state, and the producer has almost of necessity to place his tobacco under the control of, and for sale by, these several warehousemen at public auction. All this tobacco must necessarily pass through these warehouses, subject to such charges as are reasonable and proper. Such a public duty may be imposed on these warehousemen in express terms or by implication, but whether so imposed or not, it arises from the facts of the case. In this great tobacco center the producer is restricted to these public warehouses, or rather these public warehouses have a mutual monopoly of the sales of tobacco at auction, and the fact that there is more than one or a dozen such warehouses cannot affect the question."

All of these cases now under discussion are alike in this, that in all of them the conditions surrounding the industry, and these alone, are held enough to put the business within the law of public calling. That position of affairs may be summed up in a single phrase — virtual monopoly. A review of the instances which have been cited in the course of this discussion will show that this conception of virtual monopoly will cover everything. Nothing narrower will do, as for example the difference sometimes made between the undertaking of a public service and the furnishing of a public supply. Now, it is true that most of the cases are cases of service — the railway and the warehouse, for example; but others of the cases are of supply, — the waterworks and gas works, for instance. Indeed, there is nothing in this distinction, either in economics or in law. Virtual monopoly is therefore the exact description of the situation. It is submitted that any business is made out to be a public calling in which there is, from the nature of things, an inherent virtual monopoly.

VI.

Virtual monopoly must now be differentiated from virtual competition. It is submitted that upon this difference our constitutional law turns. If virtual monopoly is made out as the permanent condition of affairs in a given business, then the law, it seems, will consider that calling public in its nature; on the other hand, if virtual competition is proved as the regular course of things in a

given industry, the law will hold all businesses within it as private in their character. In the public calling, regulation of service, facilities, prices, and discriminations is possible to any extent. Such monopolistic conditions demand such police; in no period has this been more apparent than now. In the private callings, however, no such legislation should be permitted; in no epoch has it been more necessary to insist upon this. Competitive conditions should be left without such restrictions.

From the present discussion it must be evident that the industrial trust is near to this indistinct line which separates public employment from private business. In various lines of business at the present time there are at most a few corporations, often one corporation, which have substantial control of the market in that industry. Whether these monopolistic conditions are real or fictitious, natural or accidental, is the question. A most interesting case at this point is Inter-Ocean Publishing Company *v.* Associated Press.[1] The plaintiff newspaper had regularly taken the news of the defendant bureau. One of the by-laws of the Associated Press forbade members to buy news of any other agency; notwithstanding which the plaintiff took specials of the Sun Publishing Association. Thereupon the Associated Press enforced its by-law against the plaintiff, which is the basis of this action.

Mr. Justice Phillips held the by-law bad: "The organization of such a method of gathering information and news from so wide an extent of territory as is done by the appellee corporation, and the dissemination of that news, requires the expenditure of vast sums of money. It reaches out to the various parts of the United States, where its agents gather news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering the information that is centered in an association of the character of the appellee because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports from such an association as appellee. For news gathered from all parts of the country the various newspapers are almost solely dependent on such an association, and if they are prohibited from publishing it or its use is refused to them, their character as newspapers is destroyed and they would soon become

[1] 184 Ill. 438.

practically worthless publications. The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property."[1]

These estimates of the position of the Associated Press may with advantage be compared with the accounts one has of the operation of the Standard Oil Company. The interests consolidated under this management seem to have a control of the distribution of the products of petroleum which is substantially complete. Take the single point of the transportation of the oil. The crude oil is taken up by pipes at the wells, carried through a pipe line system to the refineries in different parts of the country. The product is sent from the refinery in special steamers or private cars, at local points it is put into large tanks, from these the carts are filled, from these the grocer's vats, from these the customer's can. In all these processes the oil is handled as a liquid, it is never put into a package. In all this there is little that is blameworthy; from an economic standpoint there is much that is praiseworthy. But it is plain that such conditions have produced a virtual monopoly in this business. The control that the Standard Oil Company has of its market is such that effective competition is no longer to be expected. By the principal tests, also, that have been discussed, this virtual monopoly appears. For a competitor to duplicate such a system of transportation as has been just described would involve such a cost that no investors would be found to take the risk. On the other hand, for one to undertake competition against the Standard Oil Company without laying such a network over the country, but relying upon the ordinary methods of transportation, would almost surely result in failure, since the cost of transportation of oil in packages, is, for practicable purposes, no alternative at all, because of the increased cost of transportation by such methods. It is recognition of

[1] Whether the associated news companies are in public calling is in dispute. See State *v.* Associated Press, 159 Mo. 410.

this, before rivalry is attempted, that more than anything else deters any competition.

Again, take the most recent instance, — the United States Steel Corporation. Under that management are concentrated all the industries that begin at the mines and end with the marketed product. It is its comprehension which makes it unlike any other corporation in its line of business. It is that in part that gives it control of its market. Add to this its commanding position due to its control of the ore lands upon the upper lakes, to its fleet of lake steamers, to its private railroads, and to its priorities in shipments. It owes its present monopoly to these things more even than to its aggregation of plants and its enormous capitalization.

But the case for virtual monopoly is not quite so plain in the case of the United States Steel Corporation as in the case of the Standard Oil Company. There is not so much to deter competition. Although a steel company must have a large capitalization, ten million dollars will do to construct a plant large enough to be efficient; and if the investors were assured of the protection of the law, the money could be found. But, after all, if the new ten million company began operations and sold in the general market, the restrictive conditions would still remain in substance; only two would share in the monopolistic position instead of one. This situation would result in much better conditions in the market; but it would not alter the fact that virtual monopoly rather than virtual competition prevailed in that business.

Whether the recognition of public calling as the result of virtual monopoly will come by legislation or adjudication it would be impossible to predict. It would be done with more speed by legislatures; it may be done with more care by the courts. In taking a proper attitude towards this question, the courts should say that they will accept any legislation that puts the industrial trusts under state regulation unless it seems to them that the legislation goes so far as to be outrageous, while they will put no business into the class of public calling unless they are convinced beyond reasonable doubt that it belongs there. The courts that take the conservative view upon this general problem of state regulation of the industries go no further than this, after all. Ladd *v.* Cotton Press Company [1] is one such case. There the company refused to treat its patrons alike.

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[1] 53 Tex. 172.

Mr. Chief Justice Moore held that so far as the actual law of Texas was concerned the company might do what it pleased: "The business of warehousing and compressing cotton is free to every one who wishes to engage in it. No grant or franchise need be obtained from the state to authorize those desiring to do so to embark in this character of business. It is not one of the employments which the common law declares public. Nor is it claimed to have been made so by statute. And we know of no authority, and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici* merely by reason of its extent. If the magnitude of a particular business is such, and the persons affected by it so numerous, that the interest of society demands that the rules and principles applicable to public employments should be applied to it, this would have to be done by the legislature, if not restrained from doing so by the Constitution, before the demand for such an use could be enforced by the courts."[1]

In all of these businesses discussed in this section competition, although from a legal point of view possible, is from the economic point of view improbable. So far as one can see, virtual competition is at an end in many of the great industries, and virtual monopoly will henceforth prevail. Therefore it must be said that the public has now an interest in the conduct of these businesses by their owners; they are affected at the present time with a public interest, since these agencies are carried on in a manner to make them of public consequence. Therefore the corporations conducting these businesses, having devoted their property to a use in which the public has an interest, have in effect granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created.

VII.

Our law has always held artificial monopoly to be an odious thing. Suppression of competition has always been dealt with as an evil by the common law. From the beginnings of our law, attempts by those in a given trade to obtain control of their markets have been held illegal. An early case that sums up the whole

[1] The following cases hold that in a doubtful situation legislative declaration is necessary: Dueber Co. *v.* Howard Co., 66 Fed. Rep. 645; American Co. *v.* Exchange, 143 Ill. 239; Delaware Railroad *v.* Stockyard, 46 N. J. Eq. 281; State *v.* Goodwill, 33 W. Va. 179.

matter is the case of the Button Makers,[1] the whole report of which follows. "Leave was granted to file an information against several plate-button makers for combining by covenants not to sell under a set rate. Holt, Chief Justice. It is fit that all confederacies by those of trade to raise their rates should be suppressed."

Whatever has tended to destroy competition and to further monopoly has thus appeared to our courts to be vicious. If such an arrangement put it in the power of one party to control the production of another in any way, that has been held quite sufficient for the utter condemnation of the contract as being against public policy. It has been enough if the tendency of the agreement will be to bring about monopolistic conditions if more of the same sort were entered into. And it does not relieve the situation if the baneful effects may be counteracted to a greater or lesser degree by competition of parties outside of the agreement. Upon the whole, few rules in our policy are so thoroughgoing.[2]

Central Ohio Salt Company *v.* Guthrie [3] is a representative case. By the arrangement in that case all the salt manufacturers, with one or two exceptions, in a large salt-producing territory combined for the expressed purpose of regulating the production and price of salt. A board of directors was chosen; and all salt made by the owners as soon as packed into barrels was placed under the control of the directors. By a by-law the manner and time of receiving and distributing salt was to be under the control of the directors, and the directors were to make monthly reports of sales, and pay over the proceeds to the members in proportion to the amount of salt received from each.

Upon these facts Mr. Chief Justice McIlvaine said in part: "Public policy unquestionably favors competition in trade to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices, to the injury of the general public. The clear tendency of such an agreement is to establish a monopoly and to destroy competition in trade, and for that reason, upon

[1] 12 Mod. 248.

[2] The following cases among others hold a contract in total restraint of trade bad: Toby *v.* Major, 43 Sol. Jour. 778; Oliver *v.* Gilmore, 52 Fed. Rep. 563; Tuscaloosa Ice Co. *v.* Williams, 127 Ala. 110; Lumber Co. *v.* Hays, 76 Cal. 387; Craft *v.* McConough, 79 Ill. 346; Chapin *v.* Brown Bros., 83 Ia. 156; Clark *v.* Needham, 125 Mich. 84; Fairbank *v.* Leary, 40 Wis. 637.

[3] 35 Oh. St. 666.

grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public. On the whole case we are clearly of the opinion that this agreement is void as against public policy."[1]

Such combinations to control the market have always been illegal in this way upon the ground that a combination had potentialities that no individual had to engross a product. But more than this, to form such combination which would control the market has been held an actionable conspiracy. It is upon this basis that the modern anti-trust statutes, which are to be found in so many jurisdictions to-day, have been rested. These laws demand competition through thick and thin; they regard monopoly as always unnatural, due wherever it is found to the machinations of evil-disposed conspirators against the commonwealth. In this view it is lost to sight that although in the usual trades competition has been under former conditions the natural state of things, at the present time in many businesses conditions which involve more or less of monopoly prevail.

The extent to which these anti-trust laws go may be seen in the leading case under the Sherman Anti-Trust Act, Addystone Pipe Company *v.* United States.[2] This arrangement was entered into by almost all of the manufacturers of iron pipe between the Alleghany Mountains and the Rocky Mountains. Before sales could be made by any member of the pool, he must obtain the right from the association. These rights were sold at a secret auction conducted by the central body, and the firm that bid the highest bonus got the right to make a tender to the customer whose business had been sold over the table in this manner. The others were bound to aid by furnishing fictitious competition by putting in higher bids; so that customers noticed no more than that prices went higher and higher. Matters at last reached such a

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[1] The following cases among others hold an agreement to control the market invalid: Hilton *v.* Eckersley, 6 E. & B. 47; Pacific Co. *v.* Alder, 98 Cal. 110; Moore *v.* Bennet, 140 Ill. 69; India Bagging Ass'n *v.* Kock, 14 La. Ann. 168; Cohen *v.* Envelope Co., 166 N. Y. 292; Morris Coal Co. *v.* Barclay Co., 68 Pa. St. 173; Mallory *v.* Oil Works, 86 Tenn. 59.

[2] 175 U. S. 211.

stage in that trade that the Department of Justice interfered, invoked the Sherman Anti-Trust Act, and obtained an injunction dissolving the combination.

In the course of the final decision Mr. Justice Peckham said: "The combination thus had a direct, immediate, and intended relation to, and effect upon, the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed, and but for the restriction the resulting high prices for pipe would not have obtained. We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity are continually being made. Total suppression of trade in the commodity is not necessary in order to render the combination one in restraint of trade."[1]

That the anti-trust statute has its uses is not to be denied; the present case shows the need of some such police regulation. But the modern legislator in drawing the modern statute of this sort makes no discrimination between times and places. To him monopoly is altogether bad, whether unnatural or natural, abnormal or normal. The result is that many of these anti-trust statutes even go so far as to make any concern that is a member of a combination in restraint of trade a commercial outlaw, unable even to collect its bills from its customers. But this uncompromising position of the law has had an effect of the greatest value. It has led all prudent people concerned in the promotion of great enterprises to abandon this loose form of association as too dangerous to be practicable. And this advance of the problem to this new stage is the first step in the solution of the trust problem.

The approved form to-day for making a consolidation of interests is by the formation of a single gigantic corporation intended to take over all the different concerns that are to be brought together. The courts have already dealt with the legality of this

[1] The following cases among others hold a combination in suppression of competition illegal: United States *v.* Joint Traffic Ass'n, 171 U. S. 605; State *v.* Insurance Co., 66 Ark. 466; State *v.* Gas Co., 153 Ind. 483; Anderson *v.* Jett, 89 Ky. 375; State *v.* Shlitz Co., 104 Tenn. 715; State *v.* Firemen's Club, 156 Mo. 1; Nester *v.* Brewing Co., 161 Pa. St. 473.

operation. In Trenton Potteries Company *v.* Oliphant[1] a conveyance had been made by the owners of a pottery business to the Trenton Potteries Company, which carried with it ancillary covenants by the sellers not to compete against the business sold. As the good will was included in the transfer, these covenants would be good, if the whole transaction were unobjectionable. The difficulty on this point was that the corporation grantee had been formed for the express purpose of taking over various competing plants, and that the object aimed at by the parties was to secure power to suppress competition and to control production.

Upon this point Mr. Chief Justice Magie took this marked advance in the law governing this problem: "Contracts by independent and unconnected manufacturers or traders looking to the control of the prices of their commodities, either by limitation of production, or by restriction on distribution, or by express agreement to maintain specified prices, are without doubt opposed to public policy. But appellant is a corporation and not an individual. Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregations of individuals, organized as prescribed to carry on almost every conceivable manufacture or trade: such corporations are empowered to purchase, hold, and use property appropriate to their business. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish or, for a time at least, destroy competition. Contracts for such purchases cannot be refused enforcement."

Upon the faith of the assurance of counsel that the law is as this decision lays it down, billions of invested capital depend. There is no reason to suppose that this will not be accepted as law in most jurisdictions. Indeed, the law governing corporations has always regarded the corporation as an entity. One legal person, which is what the law holds the corporation to be, cannot be a combination in the eye of the law, — that would be a contradiction in terms. Moreover, apart from technicality, upon policy the corporation is altogether a different thing from the

[1] 58 N. J. Eq. 507.

association. In a corporation responsibility is concentrated and regulation is possible, because publicity is obtainable, and enforcement may be definite. Now that the law has driven the monopoly combination out from the cover of the blind into the open corporate form, it is possible to know what is best to be done, and it is possible, having decided that, to do it.[1]

The problem is therefore much simplified since the time of the trusts. It has been reduced to lowest terms by the praiseworthy activity of the law in insisting that all combinations of every stripe should be destroyed. Now that we have the fruits of that first victory in the enforced form of the large corporation, we may hold a council of war during this armistice. Shall these great corporations be destroyed, or shall they be regulated? That, it is submitted, is the trust problem in its latest phase. All of the law for the destruction of combinations in restraint of trade is to a certain extent superseded because the new monopoly is no longer in the form of a combination. On the other hand the law for the regulation of public employments can now for the first time be effectively applied to the whole field of virtual monopoly.

VIII.

Our law reports during the last decade have furnished us abundant evidence of the industrial wrongs that the trusts are perpetrating. Upon the whole, that upon which those who bear the brunt of these new conditions feel most strongly is the discriminations that these great corporations make in their dealings. These predatory raids which the robber trusts make into the field of peaceful competition raise the chief outcry against them. And this just complaint will not be stopped by pointing out that this sort of thing has been done all along by various dealers and has not been held unfair. This may be said to be the most important of the recent discoveries about the potentialities of the trusts: that a course of dealing which was fair enough in carrying on the former smaller businesses is essentially unfair in the conduct of the later larger businesses.

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[1] It cannot be said that it is settled beyond dispute that the consolidation by incorporation is safe. The following cases imply that it is: United States *v.* E. C. Knight Co., 156 U. S. 1; Central Shade Co. *v.* Cushman, 143 Mass. 353; Meredith *v.* Zinc Co., 37 Atl 539 (N. J.); Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484. On the other hand, the following cases imply that it is not: People *v.* Distilling Co., 156 Ill. 448; Richardson *v.* Buhl, 77 Mich. 632; National Co. *v.* Grote Store, 80 Md. App. 247; People *v.* Duke, 44 N. Y. Supp. 336.

The law against wrongs of this sort is still in the making. It has at least gone as far as the case of Jackson *v.* Stanfield.[1] Jackson was a broker engaged in buying and selling lumber. Stanfield was a member of a retail lumber dealers' association. The rules of this association provided that if any wholesale dealer should sell lumber direct instead of through retailers, all the members of the association of the retailers should upon notice refuse to have further dealings with such a wholesaler. In this particular case Jackson was the person injured by the enforcement of this rule by the association.

In holding this a conspiracy Dailey, J., said: "The great weight of authority supports the doctrine, that where the policy pursued against a trade or business is calculated to destroy or injure the business of the person so engaged either by threats or by intimidation, it becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil suit for damages therefor. It is not a mere passive, let-alone policy, a withdrawal of all business relations, intercourse, and fellowship, that creates the liability, but the threats and intimidation involved in it."[2]

The case just discussed was against interference by a combination with the business of a rival. Whether a direct refusal by a combination to furnish goods to a dealer is illegal is the next question. Lowry *v.* Tile, Mantel, and Grate Association[3] decides even that to be against the Federal Anti-Trust Law. The amended complaint alleged: That, about the time of the formation of the association, plaintiffs had placed orders for tiles with the Columbia Encaustic Tile Company, which cancelled plaintiffs' orders because plaintiffs did not belong to the Tile, Mantel, and Grate Association; that, therefore, by reason of the monopoly of such association, plaintiffs are damaged in the sum of ten thousand dollars. Plaintiffs prayed for treble the sum of ten thousand dollars, in accordance with the provisions of the above-named act, and for further equitable relief. The ground of demurrer was that the amended complaint did not state facts sufficient to constitute a cause of action.

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[1] 137 Ind. 592.

[2] The following cases are against interference by combinations: Davenant *v.* Hurdis, Moore 576; Boots Co. *v.* Grundy, 82 L. T. 769; S. *v.* Glidden, 55 Conn. 46; S. *v.* Donelson, 32 N. J. Law, 151; McCauley *v.* Tierney, 19 R. I. 255; Barr *v.* Trades Council, 53 N. J. Eq. 101; Olive *v.* Van Dalten, 7 Tex. Civ. App. 630; Bailey *v.* Plumbers' Ass'n, 103 Tenn. 99.

[3] 98 Fed. Rep. 817.

Morrow, the district judge, said in part: "The allegations charging conspiracy and combination to raise the price of the commodities in question, and of an agreement by the members of such combination to sell these commodities at such prices as shall be arbitrarily fixed by the combination in question, together with the further allegation that such combination has been made with the intent of monopolizing trade and commerce between California and other states, are sufficient, under these authorities, to bring the case within the operation of the provisions of the Sherman Act. Defendants' demurrer upon the ground of the insufficiency of the facts stated to constitute a cause of action cannot, therefore, be sustained." [1]

In view of these authorities it may be predicted that courts are going to do something to protect the ordinary man in business from such competition by such combinations. The wish to do this in every case is seen in People *v.* Duke;[2] but the circumstances alleged in that case were peculiarly outrageous. This indictment charged the defendants with the crime of conspiracy. It alleged that, at the time specified, they were officers and agents of a corporation called the American Tobacco Company; that they controlled, managed, and operated the said corporation; that the greater portion of the cigarettes manufactured and vended in the United States were made and vended by them; that they (the defendants) and others conspired unlawfully to commit an act injurious to trade and commerce, — that is to say, to monopolize the entire business of making and vending cigarettes throughout the United States, and to exclude every other person from engaging in such business; to limit, fix, and control the production, manufacture, and output of cigarettes, by conspiring to compel and force such dealers and jobbers to sell at arbitrarily fixed prices; to coerce, force, and compel such dealers and jobbers to deal exclusively in the cigarettes of the American Tobacco Company, by refusing to sell to all who dealt in cigarettes of any other manufacturer. Two overt acts, in furtherance of this agreement, were then specifically set forth.

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[1] The following cases, among many, hold conspiracies to injure another in business actionable: R. *v.* Bykerdike, 1 M. & Rob. 179; R. *v.* Parnell, 14 Cox, C. C. 508; Hornby *v.* Close, L. R. 2 Q. B. 153; Orr *v.* Ins. Co., 12 La. Ann. 255; Plant *v.* Woods, 176 Mass. 492; Lucke *v.* Assembly, 77 Md. 396; Weston *v.* Barnicott, 175 Mass. 454; Mapstick *v.* Ramage, 9 Neb. 390; Ertz *v.* Produce Exchange, 79 Minn. 140; State *v.* Dyer, 67 Vt. 695; Gatson *v.* Buerning, 106 Wis. 1.

[2] 44 N. Y. Supp. 336.

Mr. Justice Fitzgerald disposed of the argument for the defendants in this manner: "It is further claimed that, because defendants are directors and agents of a private corporation, they had a perfect right to do all of the acts alleged against them. A very wide latitude must, indeed, be accorded to the managers of a vast private enterprise, lawfully organized, and it is exceedingly difficult to fix the bounds beyond which they may not lawfully go. They are certainly entitled to reap all the advantages which skill, experience, large investment, enterprise, and splendid facilities afford them over less favorably equipped competitors; and if, by such means, vast trade is attracted, to the detriment of mere business rivals, it would be difficult to see how injury to the public could arise. The principle established by the adjudged cases appears to be that, where actual or possible public injury does not arise from the business methods of individuals or corporations, the natural law of supply and demand may be depended upon to protect the public welfare. A trading corporation is entitled to all the advantages it can secure under fair and free competition, but its officers and agents may become criminally liable if they confederate to secure a monopoly by threats and menaces directed against competitors, to force and coerce them to relinquish the rights to the fullest enjoyment of which all are entitled. If, then, the proof in the case at bar should establish the allegations of the indictment, might not the refusal to sell to jobbers and dealers except upon the required conditions be properly found to constitute menace, coercion, and intimidation? And if such methods or devices were resorted to by defendants to restrain lawful trade and commerce, and create a monopoly, are they not guilty of conspiracy? Demurrer disallowed, with leave to defendants to plead over."

On the other hand in a somewhat similar case — United States *v.* Greenhut[1] — the court decided the other way. This indictment set forth that the defendants were officers of the Distilling and Cattle Feeding Company; that, as such officers, they purchased or leased seventy-eight theretofore competing distilleries in the United States, and, within certain states specified, used, managed, controlled, and operated the said distilleries, manufacturing sixty-six million gallons of distilled spirits, the whole being seventy-five per cent of all the spirits sold in the United States; that all the acts com-

[1] 50 Fed. Rep. 469.

plained of were done with intent to monopolize the business and to prevent free competition in the sale, in pursuance of which the defendants agreed with various dealers that if such dealers would buy all their supplies from the defendants for six months, the company would give them a rebate of two cents per gallon on their purchases, whereby in the end they had increased the usual prices at which spirits were sold in Massachusetts.

Mr. Justice Nelson quashed the indictment upon the ground that no conspiracy but simply incorporation was found: "This indictment does not allege that the defendants entered into any unlawful combination or conspiracy. Nor does it contain any argument that they had monopolized trade or commerce among the several states or foreign nations. It is true that the indictment charges that the defendants have done certain things with intent to monopolize the traffic in distilled spirits among the several states, and that they have increased the usual prices at which distilled spirits were sold in Massachusetts; and have prevented and counteracted the effect of free competition in such traffic in Massachusetts. But none of these things are singly made offences by the statute."

There is nothing to show that the allegations made in these two cases are true in respect to these two particular corporations. But if it be true that this sort of thing is practised when necessary as part of the business policy of the modern trust, the situation is serious indeed. The trust, it is thus alleged, refuses to sell at all to small dealers who buy goods of any description from competing concerns. Smaller manufacturers as a consequence would find it almost impossible against such competition to dispose of their goods, however meritorious, because the trust might have a few brands well known to the public which the small dealer must have in stock. It is the danger of competition of this sort which makes the trust problem so acute.

These opposite opinions upon the legality of these practices are what one would expect to find, for this is the borderland between two fields of the law. The law of private calling, on the one hand, permits any refusal to deal for any purpose by any individual in trade, justifies therefore any discrimination between any customers for any policy. The present experience of the public with the management of some of the modern industrial corporations it would seem ought to have taught the lesson that this law has been outgrown. The contention is that the time has

come to put these great businesses under the law of public calling; for that law requires that all who apply shall be served without discrimination, for reasonable compensation with proper facilities. The enforcement of this law would put an end to the worst abuses by the present trusts.

IX.

Without doubt public opinion to-day demands publicity as to the doings of these great corporations, — not formal and general statements, but detailed and specific reports to be made to public bodies with full powers in the matter. But publicity, it is obvious, is only the means to an end; the end is effective regulation upon the basis of this information. To meet the exigencies of the present situation, positive law is required. This seems to be an accurate statement of the present status of the trust problem. What are the industrial rights and wrongs in the present operations of these industrial trusts? How may these be protected and prohibited as legal rights and wrongs?

It has been pointed out that the power of the trusts to crush efficient competitors is dependent to a large extent upon various kinds of personal discrimination. It will be profitable to see how the courts have dealt with this sort of thing in the case of the recognized public callings, since the establishment of any business as public in its nature depends in the last analysis upon the existence of virtual monopoly. The rule requiring service to all who apply without discrimination against any, is founded upon the absolute necessity, as a social question, of preventing those who have control of the market from exercising that power to the disruption of the industrial order.

The promptness with which the courts act to prevent personal discrimination in the case of an admitted public employment is shown in a decision like Menacho *v.* Ward.[1] It was alleged by the complainant in that case that the defendants had announced generally to New York merchants engaged in the Cuban trade that they must not patronize steamships which offered for a single voyage. The complainants, notwithstanding this warning, had shipped by a tramp steamer. They were thereupon notified that they had been placed on the black list; as a consequence of which act the defendants had been charged greater rates of freight than those

[1] 27 Fed. Rep. 529.

merchants had been charged who shipped exclusively by the defendants.

Mr. Justice Wallace said: "The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise, to carry, but because they refuse to patronize the defendants exclusively. The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage upon the best terms they can. If it is tolerated it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between those places. Such discrimination is not only unreasonable, but is odious."

In public businesses the law is thus flatly opposed to such discrimination in the open; it is equally opposed to such discrimination under cover. One in public employment is not allowed to justify such acts on the ground of business policy when they are contrary to the public interest. Arrangements cannot be enforced to strengthen one's own position when that involves a violation of public duty. An extreme case in point is Chesapeake Telephone Company *v.* Baltimore Telegraph Company. The telephone company was operating under a license which bound it to give its service for delivery of messages to the Western Union Telegraph Company, but to refuse all competitors of the Western Union.

Mr. Chief Justice Story said: "The appellant is in the exercise of a public employment, and has assumed the duty of serving the public which is in that employment. In this case the appellant is an incorporated body, but it makes no difference whether the party owning and operating a telegraph line or a telephone exchange be a corporation or an individual, the duty imposed, in respect to the public, is the same. It is the nature of the service undertaken to be performed that creates the duty to the public, and in which the public have an interest, and not simply the body that may be invested with power. The telegraph and telephone are important instruments of commerce, and their service as such has become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own or

control them can no more refuse to perform impartially the functions that they have assumed to discharge, than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them, but they have no power to discriminate, and while offering to serve some, refuse to serve others. The law requires them to be impartial, and to serve all alike, upon compliance with their reasonable rules and regulations."

The necessity of compelling those in public employment to serve without discrimination is thus apparent; it is no less obvious in every case of virtual monopoly. It seems to be an almost conclusive argument for treating as public-service companies all great corporations that have established control of their market, that by no other law than that of public calling can the situation be met. In private calling factor's agreements of this sort are supported, which shows that the present conditions in the conduct of these great businesses have outgrown this law. In public callings every such restrictive condition is void which points to this law as the way out. All of which has this further application: in private business this sort of competition is properly held fair; in public business it is properly held unfair. That it is the modern desire to protect the small manufacturers from such competition by the large manufacturers there can be no doubt to any one informed of present public opinion upon these questions.

The law of public calling is thus a solution for the most desperate need in the present situation; it is also the way out for the only other necessity of the situation that is of first importance. In private business one may demand any price one may get; not so in public business, there only a reasonable price can be exacted. That there is danger of unreasonable prices in the present, is quite evident. Control of the market leads to power to put up price, power which unfortunately leads to action. No law can effectively deal with monopoly without the right to restrict to reasonable prices. The law governing the public services has that right.[1]

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[1] The following cases among others discuss the well-established rule against discrimination in public employment: Western Telegraph Co. *v.* Call Publishing Co., 181 U. S. 92; Hays *v.* Penn. Co., 12 Fed. Rep. 309; Mobile *v.* Brenville Water Co., 30 So. Rep. 445; Messenger *v.* Penn. R. R., 37 N. Y. L. 531; Root *v.* Long Is. R. R., 114 N. Y. 300; Griffin *v.* Goldsboro Water Co., 112 N. C. 206; State *v.* Cincinnati R. R., 47 Oh. St. 130; Bailey *v.* Fayette Gas Co., 193 Pa. St. 175.

With this difficult problem of the determination of the reasonable rate, the law of public calling is dealing with some success. The scientific nature of the subject is now beginning to be apprehended. Elaborate rules are being framed; for at last the rights of both sides are appreciated. On the one hand the full right of the public to restrict a public service company to reasonable charges is recognized; on the other hand the corresponding right of the public service company to a fair return upon its capital is admitted. The case of Brymer *v.* Butler Water Company[1] shows how a late decision deals with this troublesome conflict of interests. A schedule of rates fixed by a water company came up for examination under a statute which gave the court powers to revise.

The method of the court in dealing with this schedule is shown in the opinion of Mr. Justice Williams: "The court is authorized to say: This charge is oppressive, you must decrease it. You are entitled to a charge that will yield a fair compensation to you, but you must not be extortionate. This leads us to the second question raised, viz.: by what rule is the court to determine what is reasonable and what is oppressive? Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for, then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable."

A company that is engaged in a public business is therefore entitled to a fair return upon its investment. This is true of a gas plant and water works; this would be true of the oil company and the steel corporation if the law of public callings were enforced against them. The law of public callings does not demand confiscation by any means; it only involves limitation at the most. But what is the true investment, and what is a fair return upon it? The law of public employment cannot deal effectively with this dangerous phase of the trust problem unless it is clear upon these points. It is common knowledge that in most cases the capital-

[1] 179 Pa. St. 231.

ization of industrial trusts is double the actual amount ever invested in the enterprises consolidated. This sort of thing would not confuse the Supreme Court of the United States in the determination of the propriety of rates. Smyth *v.* Ames [1] makes that point clear.

In that important case Mr. Justice Harlan said in part: "If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged. We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under the particular rate prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

Working out of the reasonable price according to the law of public employment as shown in these opinions will defeat even the most insidious attempts by the industrial corporations to exact from the general public while they have virtual control of the market more than a fair return for services rendered. The plea is often made that these great corporations are in truth capitalized at no more than their future earning capacity. Granted that this is the near truth, it is no argument against the right of the

[1] 169 U. S. 466.

public in the matter. Indeed, if the validity of this argument in behalf of a company that had virtual monopoly was once admitted, it would destroy all possibility of regulation, since the tighter the monopoly the higher the price, the higher the price the greater the earning capacity, the greater the earning capacity the larger the capitalization, the larger the capitalization the higher the price, — that would be the working out of it.[1]

Plainly there is no safe basis for the determination of the rate except the actual investment. It may be urged that the result of this rule will be to give to the public the advantage of operation under monopolistic conditions, in particular the elimination of the wastes of competition. The reply is that this is precisely the method that should be pursued in dealing with the trust problem. If the state permits monopoly it may demand in return that the monopolist serve at a reasonable price. This has always been the law of public callings when the statement of it is made with discrimination. No rate per ton, no price per cubic foot is reasonable in itself; it depends for its propriety upon whether by such charges the railroad company or the gas company in question will earn too much. In the same way the contention of the promoters of the trusts should be met by our law. It is not an answer for the Standard Oil Company to point to the fact that upon the whole it has not advanced the price of kerosene above the price at which it would have been fixed from time to time had competitive conditions prevailed during the whole period. It is still open to the general public to point to the forty-eight per cent dividends in the last years, to say that these are the proofs of the contention that, notwithstanding, the price of kerosene has been too high during the whole period.

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It is not pretended that what has been suggested in this article should be taken as established. It is put forth merely as a working hypothesis that a solution of the trust problem may be found in the law governing the public callings. That the opera-

[1] The following cases among others discuss the established rule restricting public-service companies to reasonable prices: Canada Southern Co. *v.* International Bridge, 8 App. Cas. 723; Reagan *v.* Trust Co., 154 U. S. 362; Land Co. *v.* City, 174 U. S. 739; So. Pacific Co. *v.* Commissioners, 78 Fed. Rep. 236; Milwaukee Railway *v.* Milwaukee, 87 Fed. Rep. 577; Gloucester Water Co. *v.* Gloucester, 179 Mass. 365; Stevenson *v.* Great Northern Ry., 69 Minn. 353.

tions of these trusts have become of such public consequence as to affect them with a public interest is submitted for approval. That at least the greatest of these trusts have, in their control of their respective markets, so far an assured permanence from the conditions prevailing in their respective businesses, is stated subject to correction. If these things are as asserted, it is urged that these particular industrial corporations should be held public-service companies. It is not to be wished upon social grounds that the results of this industrial evolution should be swept away by prohibitions against these new conditions. It is rather to be desired upon economic grounds that these effective producers in their special fields should be turned to the common advantage. The effectual regulation which may secure this general good, it is submitted, is to be found in the body of the law governing public employment, which requires, with elaborate detail for the enforcement of the general principles, that those who conduct a business in which the public has an interest serve all who apply without discrimination, for reasonable compensation, with adequate facilities. The enforcement of that law ought to accommodate all of the conflicting interests involved in this great issue. If this law of public employment could be enforced against the industrial trusts, it may be hoped, a solution would be found for the trust problem.

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THE TAXATION OF FOREIGN CORPORATIONS.

THE jurisdiction of a state to levy taxes, like jurisdiction in general, depends in the last analysis on power. A state may lay a tax on anything from which it has power to exact payment. It may tax all persons domiciled within its territory, all property situated within its territory, and all acts done within its territory. As Mr. Justice Field said:[1]

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

A foreign corporation, being unable to leave in person the state of charter, and thus become domiciled in another state, cannot be personally taxed; it can be taxed, therefore, only upon its property within the taxing state, and upon its acts there done.

A tax levied upon property outside the jurisdiction of the taxing state is forbidden by the Fourteenth Amendment to the Constitution of the United States, as a taking of property without due process of law; and the question of jurisdiction to tax may therefore always be raised.

Let us now examine various classes of property and business, in

[1] State Tax on Foreign-Held Bonds, 15 Wall. 300.

order to determine the power of a state to tax a foreign corporation upon them.

A foreign corporation is liable to taxation in any state upon all its tangible property, real or personal, situated within the state.[1] The foreign corporation is to be treated like any other owner of taxable property. It is, of course, always a question whether a foreign corporation comes within the language of a statute which imposes a tax; for such statutes are often so phrased as to exclude foreign corporations. A statute subjecting "non-residents" to taxation on the sums invested in business includes foreign corporations;[2] while on the other hand a statute providing for taxation of personal estate in the city where the owner is an "inhabitant" does not render the property of a foreign corporation liable to taxation, since it is not an inhabitant of any place within the state.[3] So where the cars of a railroad company were by statute taxable at the home office or principal place of business of the company, the cars of a foreign railroad company could not be taxed, since its principal place of business was outside the state.[4]

Mere intangible property, not represented by a tangible security of value, is not in fact situated anywhere, or subject to any jurisdiction by reason of its *situs*. It is, to be sure, often said that a chose in action has a *situs* with the debtor, or with the creditor; and courts are in hopeless confusion on the question whether the obligation should properly be held to be situated with the one or the other. But to assign place to an intangible and incorporeal thing is at most a mere fiction, upon which jurisdiction for taxation should not be founded. Such intangible property can be reached only through the owner and at his domicil, since it forms part of his property, and he may be taxed according to the amount of his property.

But there is a growing tendency to assign certain kinds of intangible property to some *situs*, and permit their taxation there. In

[1] W. U. Tel. Co. *v.* Texas, 105 U. S. 460; Atlantic & P. Tel. Co. *v.* Philadelphia, 190 U. S. 160; Armour Packing Co. *v.* Savannah, 115 Ga. 140, 41 S. E. Rep. 237; Griggsry Const. Co. *v.* Freeman, 108 La. 435, 32 So. Rep. 399; Blackstone Mfg. Co. *v.* Blackstone, 13 Gray 488; Attorney-General *v.* Bay State Mining Co., 99 Mass. 148; Boston Loan Co. *v.* Boston, 137 Mass. 332; British Comm. L. Ins. Co. *v.* Commissioners, 31 N. Y. 32; People *v.* Barker, 141 N. Y. 118.

[2] People *v.* Barker, 141 N. Y. 118; People *v.* Feitner, 62 N. Y. Supp. 1107, 49 App. Div. 108.

[3] Boston Investment Co. *v.* Boston, 158 Mass. 461.

[4] Appeal Tax Court of Baltimore *v.* Pullman P. C. Co., 50 Md. 452.

Adams Express Co. *v.* Ohio State Auditor,[1] Brewer, J., used this most suggestive and pregnant language:

"In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are, and as possessing a value which is accorded to them in the markets of the world; and that no finespun theories about *situs* should interfere to enable these large corporations, whose business is, of necessity, carried on through many states, from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires."

Of intangible property which may be assigned a *situs* for purposes of taxation, the clearest case is that of commercial securities. Stocks and bonds, and other mercantile securities of value in themselves and salable, are treated like tangible property, being regarded as within the jurisdiction of the state in which they may be found. A foreign corporation is therefore taxable for all such mercantile securities owned by it within the state, including stocks, bonds, bank-notes, promissory notes of individuals, etc.[2] So where by statute a foreign insurance company is required to deposit bonds with the state as a condition of doing business, the bonds may be taxed.[3]

This has been carried so far that money deposited in a bank by the corporation or its agent, not for transmission to the home office but for use within the state, may, it is held, be taxed as property within the state.[4]

One of the most important forms of intangible property so taxed is that employed in business. Capital employed in business within a state, in whatever form it is, may be reached by the state for purposes of taxation; and the greater portion of this business capital may be in an intangible form: good-will, claims receivable, etc., are assets of the business, and by the doctrine now prevailing are taxable at the place of business.

Thus the Supreme Court of the United States has held that the intangible property of a foreign corporation, created by the acquisition of franchises and privileges within the state, may be taxed.[5] Mr. Justice Brewer said:

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[1] 166 U. S. 185.

[2] New Orleans *v.* Stempel, 175 U. S. 309; People *v.* Roberts, 49 N. Y. Supp. 10, 25 App. Div. 16.

[3] Western Assur. Co. *v.* Halliday, 110 Fed. Rep. 259; People *v.* Home Ins. Co., 29 Cal. 533; British Commercial Life Ins. Co. *v.* Commissioners, 31 N. Y. 32.

[4] New Orleans *v.* Stempel, 175 U. S. 309; Blackstone *v.* Miller, 188 U. S. 189.

[5] Adams Exp. Co. *v.* Ohio State Auditor, 166 U. S. 185.

"It matters not in what this intangible property consists, — whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. . . .

"Suppose an express company is incorporated to transact business within the limits of a state, and does business only within such limits, and, for the purpose of transacting that business, purchases and holds a few thousands of dollars' worth of horses and wagons, and yet it so meets the wants of the people dwelling in that state, so uses the tangible property which it possesses, so transacts business therein, that its stock becomes in the markets of the state of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one, and ignore the other; while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation. . . .

"Where is the *situs* of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. . . . The Southern Pacific Railway Company is a corporation chartered by the state of Kentucky; yet, within the limits of that state, it is said to have no tangible property, and no office for the transaction of business. The vast amount of tangible property which, by lease or otherwise, it holds and operates, and all the franchises to do which it exercises, exist and are exercised in the states and territories on the Pacific slope. Do not these intangible properties, — these franchises to do, — exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every state in which that tangible property is found?"

It has been thought worth while to quote at length from this opinion, because in it is expressed, more forcibly perhaps than anywhere else, a distinct tendency of the law; a tendency which is likely to lead to novel methods of taxing "values," to use a mercantile term, rather than property in the legal sense. To the

extent of taxing the value of a business at the place where it is carried on, the law is already settled.

On this principle choses in action, whether book accounts, promissory notes, or other credits due in the regular course of business carried on by a foreign corporation within a state are taxable.[1]

So the good-will of a business, the result of exercising the corporate franchise and carrying on business within the state, is taxable there.[2] So too it would seem that the franchise of a foreign corporation to do business within a state may be taxed there as property.[3]

But if the business carried on in New York is merely the collection and distribution of dividends on the stock of another foreign corporation, the corporation, though carrying a large balance at all times in a New York bank, cannot be said to be employing capital within the state and is not taxable.[4] And when this intangible property is a franchise for a ferry granted by another state, which is regarded as an incorporeal hereditament, it cannot be included in any scheme of taxation, for it is without the state.[5]

Where this intangible property results from the entire business carried on in several states, it is obvious that one of these states cannot claim the whole of the property as taxable. The proper proceeding in that case is to tax that proportion of the whole amount which the amount of business done within the state bears to the total amount of business.[6]

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[1] London, etc., Bk. *v.* Block, 117 Fed. Rep. 900; Armour Packing Co. *v.* Savannah, 115 Ga. 140, 41 S. E. Rep. 237; Hubbard *v.* Brush, 61 Oh. St. 252, 55 N. E. Rep. 829; People *v.* Barker, 48 N. Y. Supp. 553, 23 App. Div. 524; People *v.* Barker, 53 N. Y. Supp. 921, 31 App. Div. 263; Jesse French Piano & Organ Co. *v.* Dallas, Tex. Civ. App., 61 S. W. Rep. 942. See *contra*, Liverpool, etc., Ins. Co. *v.* Assessors, 44 La. Ann. 760, 11 So. Rep. 91.

[2] People *v.* Roberts, 159 N. Y. 70, 53 N. E. Rep. 685; People *v.* Roberts, 55 N. Y. Supp. 317, 37 App. Div. 1. But see *contra* Hart *v.* Smith, 159 Ind. 182, 64 N. E. Rep. 661 (*semble*).

[3] London, etc., Bank *v.* Block, 117 Fed. Rep. 900; Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., 118 Fed. Rep. 239.

[4] People *v.* Roberts, 154 N. Y. 1, 47 N. E. Rep. 974.

[5] Louisville & J. Ferry Co. *v.* Kentucky, 188 U. S. 385.

[6] W. U. Tel. Co. *v.* Mass., 125 U. S. 530; Massachusetts *v.* W. U. Tel. Co., 141 U. S. 40; Adams Exp. Co. *v.* Ohio, 166 U. S. 185; New York *v.* Roberts, 171 U. S. 658; W. U. Tel. Co. *v.* Missouri, 190 U. S. 412; People *v.* Roberts, 152 N. Y. 59, 46 N. E. Rep. 161; Commissioners *v.* Old Dominion S. S. Co., 128 N. C. 558, 39 S. E. Rep. 358; Com. *v.* Standard Oil Co., 101 Pa. St. 119.

Under the New York Statute taxing foreign corporations on their "franchise or business" on the basis of the amount of capital stock used within the state, the actual and not the par value of the stock is the amount to be assessed.[1]

It is to be noticed that such a tax may include a tax upon tangible property. In that case if the tangible property has already been taxed as such in the same state, the tax on the business might to that extent be invalid as double taxation.[2]

While double taxation in the same state is forbidden by the constitutions of most states and by the Fourteenth Amendment to the Constitution of the United States, there is nothing to prevent the same property being taxed by as many states as can get power over it. Thus the property and franchises of a corporation may be held and exercised in several states; and the value of them gives to the shares of stock their entire value. These shares may be in one state while the owner is domiciled in another. If all these states are different, the same property may be taxed four times without infringing the Constitution; the constitutional limitations extend only to double taxation in the same jurisdiction.[3] "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far."[4] Double taxation of this sort, however unjust, cannot be declared illegal unless it is contrary to some express constitutional provision.[5]

Corporate stocks and bonds, therefore, though their intrinsic value is derived entirely from the property owned by the company and taxed as its property, may be themselves taxed in another state.[6] The stockholder or bondholder may be taxed at his domicil on the value of his securities, though the company be a foreign one;[7] and,

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[1] People *v.* Knight, 173 N. Y. 255, 65 N. E. Rep. 1102.

[2] S. W. Tel. & Tel. Co. *v.* Merschudt (Tex. Civ. App.), 65 S. W. Rep. 381.

[3] Sturges *v.* Carter, 114 U. S. 511; San Francisco *v.* Fry, 63 Cal. 470.

[4] McKenna, J., in Kidd *v.* Alabama, 188 U. S. 730, 732.

[5] Griggsry Const. Co. *v.* Freeman, 108 La. 435, 32 So. Rep. 399; State *v.* Branin, 3 Zab. 484; Dyer *v.* Osborn, 11 R. I. 321.

[6] Greenleaf *v.* Board of Review, 184 Ill. 226, 56 N. E. Rep. 295; Seward *v.* Rising Sun, 79 Ind. 351; State *v.* Branin, 3 Zab. 484; Dyer *v.* Osborn, 11 R. I. 321.

[7] Kidd *v.* Alabama, 188 U. S. 730, affirming State *v.* Kidd, 125 Ala. 413, 28 So. 480; Greenleaf *v.* Board of Review, 184 Ill. 226, 56 N. E. Rep. 295; Seward *v.* Rising Sun,

as has already been seen, these securities may also be taxed where they are held, though it is apart from the domicil of the owner. But the corporation itself cannot be taxed on the shares and bonds, since it is not the owner. In the case of bonds the owner cannot be taxed by the state of charter if the securities are not there nor the owner domiciled there; since the property which the securities are deemed to be when they are separately taxed is not there.[1] "Debts owing by corporations, like debts owing by debtors, are not property of the debtors in any sense. . . . All the property there can be in the nature of things in debts of corporations belongs to the creditors, to whom they are payable, and follows their domicil, wherever that may be. . . . The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the state, they are property beyond the jurisdiction of the state."[2]

It would seem that the same doctrine should be held in the case of stock, and that the owner could be taxed on stock away from his domicil only in some place where the certificates were kept. And it is so held in some cases.[3] But the Supreme Court of the United States has held that shareholders are taxable where the corporation is situated; Waite, C. J., saying:[4] "A share of bank stock may be in itself intangible, but it represents that which is tangible. It represents money or property invested in the capital stock of the bank. That capital is employed in business by the bank, and the business is very likely carried on at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides; but his property in this stock is protected at the place where the bank transacts his business. If he were a partner in a

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79 Ind. 351; Great Barrington *v.* County Commrs., 16 Pick. 572; State *v.* Bentley, 3 Zab. 532; Newark City Bank *v.* Assessor, 30 N. J. Law 13; Lander *v.* Burke, 65 Oh. St. 532, 63 N. E. Rep. 69; McKeen *v.* Northampton County, 49 Pa. St. 519; Whitesell *v.* Northampton County, 49 Pa. St. 526. But see *contra* Smith *v.* Exeter, 37 N. H. 556.

[1] State Tax on Foreign-Held Bonds, 15 Wall. 300.

[2] FIELD, J., in State Tax on Foreign-Held Bonds, *supra.*

[3] San Francisco *v.* Mackey, 22 Fed. Rep. 602; Railroad *v.* Commrs., 91 N. C. 454; Union Bank *v.* State, 9 Yerg. 490.

[4] Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490, 503. In Jermain *v.* R. R., 91 N. Y. 483, 492, EARL, J., expressed the same idea: "A share of stock represents the interest which the shareholder has in the capital and net earnings of the corporation."

private bank doing business at the same place, he might be taxed there on account of his interest in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporated bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there, and it seems reasonable that he should be compelled to contribute there to the expenses of maintaining the government."

The same doctrine has been held in New York [1] as to the Transfer Tax Act, which taxed succession on death. In Matter of Bronson Gray, J., thus explained the difference between bonds and stock in this respect:[2]

"The attitude of a holder of shares of capital stock is quite other than that of a holder of bonds towards the corporation which issued them. While the bondholders are simply creditors, whose concern with the corporation is limited to the fulfilment of its particular obligation, the shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprise. . . . That right as a chose in action must necessarily follow the shareholder's person; but that does not exclude the idea that the property as to which the right relates, and which is, in effect, a distinct interest in the corporate property, is not within the jurisdiction of the state for the purpose of assessment upon its transfer through the operation of any law, or of the act of its owner."

But it is submitted that the supposed distinction between bonds and stock in this respect does not exist. It is true, as has been seen, that the owner is taxable upon the capital and proceeds of a business where that business is carried on, and that a partner in a firm is therefore taxable on the value of the firm business where the firm acts; and that in many ways the shareholder in a private corporation is like a partner. But the very difference in their legal position should lead to a difference in taxation. The partner is taxed on the business of the firm because he is the legal representative of the business; there is no one else to tax. The tax paid by the partners is the tax and the only tax on the firm. But the corporation, being a legal entity, is itself, as has been seen, taxed upon the business done; to tax the stockholders also

[1] Matter of Bronson, 150 N. Y. 1, 44 N. E. Rep. 707; *In re* Cushing's Estate, 82 N. Y. Supp. 795, 40 Misc. 505.

[2] At p. 8.

upon it is to tax the very same thing twice. The legal interest of the partner in the business is that of owner: the legal interest of the stockholder is not that of owner but of creditor; to him is due from the corporation a share of the net profits. His claim is a personal one against the corporation; like the bondholder, he has only a chose in action, and no direct legal interest in the business.

In the case of a transfer tax it would seem that the state of charter might tax the privilege to the new owner of the certificate, whether upon death or by transfer *inter vivos*, to be registered as stockholder on the books of the company; and it has been suggested that this right would support the New York Transfer Tax Act so far as it might be enforced at the time of transfer on the books of the company.[1] But that particular tax appears to be rested on the power of the state to tax actual property within its jurisdiction,[2] and the tax is therefore open to the criticism just made.

In order that a chattel may be taxed in a state it must have not only a momentary *situs* there, but it must be fixed there with some degree of permanence. Thus property merely in transit through the state may not be taxed;[3] nor may a vessel, not registered within a state, which merely touches at its ports.[4] But if the chattel remains within the state for a sufficient time to become

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[1] For this sound and ingenious suggestion I am indebted to my colleague Mr. Donham.

[2] See the language of GRAY, J., on p. 6.

[3] Kelley *v.* Rhoads, 188 U. S. 1; Standard Oil Co. *v.* Bachelor, 89 Ind. 1; Conley *v.* Chedic, 7 Nev. 336; Robinson *v.* Longley, 18 Nev. 71.

[4] Hays *v.* Pacific Mail S. S. Co., 17 How. 596; St. Louis *v.* Ferry Co., 11 Wall. 423; Morgan *v.* Parham, 16 Wall. 471; Johnson *v.* DeBary-Baya Merchants' Line, 37 Fla. 499, 19 So. Rep. 640; Roberts *v.* Charlevoix, 60 Mich. 197; S. *v.* Haight, 30 N. J. Law 428. It is interesting to compare with this doctrine of the common law the language of the German Reichsoberhandelsgericht in Mahler *v.* Schirmer, 6 Entsch. des R. O. H. G. 80, s. c. translated 2 Beale's Cases on Conflict of Laws 190: "The Saxon judge may therefore be in a position to subject to the claims of his local law the decision of lawsuits about movables; but the admissibility of such subjection always depends on the actual assumption that the things have come within the jurisdiction of the Saxon law. The things must be situated within Saxony. But the momentary position is not entirely decisive; there are things which are constantly changing their position without thereby losing their legal relation to the place from which they started. This is especially true of the most important instruments of transportation, ships, and railroad trains. During their journeys they touch at foreign places only in passing, with the intention of returning to the place where their legal relations are situated. The recognition of this place of departure as the place that governs their legal relations seems to be enjoined by practical necessity."

part of the whole body of property there, incorporated with the chattels of the state, it may be taxed though it is to be sent out of the state later. Thus property bought within the state for export but not yet in transit may be taxed.[1] So it has been held that a contractor's outfit, consisting of mules, scrapers, etc., to be used for several months in constructing a railroad bed was sufficiently fixed within the state to be taxed.[2] Where however a number of chattels, like boats or railroad cars, owned by the same owner, are constantly coming into and going out of a state, the state may lay a tax proportionate to the average number in the state.[3]

Since a foreign corporation may be allowed to do business in a state upon conditions, the payment of a sum of money may be made a condition; and this may in form be the payment of a tax greater than or different from that paid by a domestic corporation. Such a tax is valid.[4] It is not properly an exercise of the power to tax property, but is a license fee paid for the privilege of entering the state, and is a necessary deduction from the right absolutely to exclude the foreign corporation. Upon a similar principle the exaction of a fee for filing a certificate of incorporation is not a tax;[5] nor is a fee for filing an annual report.[6]

In most state constitutions or statutes there is a provision that all taxes shall be uniform or equal. This does not prevent a discrimination against foreign corporations by way of exacting a license fee for the privilege of doing business in the state; but the

[1] Diamond Match Co. *v.* Ontonagon, 188 U. S. 82; Standard Oil Co. *v.* Combs, 96 Ind. 179; Carrier *v.* Gordon, 21 Oh. St. 605. See also Blackstone *v.* Miller, 188 U. S. 189.

[2] Griggsry Const. Co. *v.* Freeman, 108 La. 435, 32 So. Rep. 399.

[3] Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18. See *infra*, p. 260.

[4] Ducat *v.* Chicago, 10 Wall. 410; Liverpool Ins. Co *v.* Mass., 10 Wall. 566; Pembina Mining Co. *v.* Pa., 125 U. S. 181; Maine *v.* Grand Trunk Ry., 142 U. S. 217; Horn Silver Mining Co. *v.* New York, 143 U. S. 305; New York *v.* Roberts, 171 U. S. 658; Manchester Fire Ins. Co. *v.* Herriott, 91 Fed. Rep. 711; Goldsmith *v.* Home Ins. Co., 62 Ga. 379; Ducat *v.* Chicago, 48 Ill. 172; W. U. Tel. Co. *v.* Lieb, 76 Ill. 172; Com. *v.* Milton, 12 B. Mon. 212; Phœnix Ins. Co. *v.* Com., 5 Bush 68; State *v.* Ins. Co. of North Amer., 115 Ind. 257; Blackmer *v.* Royal Ins. Co., 115 Ind. 291; State *v.* Lothrop, 10 La. Ann. 398; State *v.* Fosdick, 21 La. Ann. 434; State *v.* Hammond Packing Co., 34 So. Rep. 368; Atty.-Gen. *v.* Bay State Mining Co., 99 Mass. 148; *Ex parte* Cohn, 13 Nev. 424; Tatem *v.* Wright, 3 Zab. 429; People *v.* Fire Assoc. of Phila., 92 N. Y. 311; Fire Dept. *v.* Noble, 3 E. D. Smith 440; W. U. Tel. Co. *v.* Mayer, 28 Oh. St. 521; Southern Gum Co *v.* Laylin, 66 Ohio St. 578, 64 N. E. Rep. 564; Slaughter *v.* Com., 13 Gratt. 767; Fire Dept. of Milwaukee *v.* Helfelstein, 16 Wis. 136.

[5] Ashley *v.* Ryan, 153 U. S. 436.

[6] Southern Gum Co. *v.* Laylin, 66 Oh. St. 578, 64 N. E. Rep. 564.

same license fee must be exacted from all corporations of the same class.[1] And such a license fee does not come within the provision of the constitution that taxation must be for revenue only.[2] Of the nature of the imposition of a license fee is the provision that an agent of a foreign corporation shall be responsible for the tax assessed upon it.[3]

Not only may a license fee be exacted for allowing the foreign corporation to do business, but a direct tax may be laid (in the absence of constitutional restriction) upon the proceeds of the business. Thus an insurance company may be taxed upon the amount of premiums received within the state.[4]

The preceding are the cases in which a state has jurisdiction to tax property and business; and in the case of foreign corporations not especially favored by the constitution a state may properly lay any such tax. But the power to regulate interstate commerce being lodged in Congress, a state legislature can lay no tax on a foreign corporation engaged in interstate commerce if the tax amounts to a regulation of such commerce. It is necessary therefore to re-examine the cases already considered with a view to the constitutional limitations.

It is clear that any tax levied upon a foreign corporation engaged in interstate commerce impedes its efficiency, and to that extent interferes with commerce. This may of course render the tax unconstitutional, but it does not necessarily do so. In the words of Field, J., in The Delaware Railroad Tax:[5]

"The tax imposed by the act in question affects commerce among the states and impedes the transit of persons and property from one state to another just in the same way and in no other that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result of itself constitutes no objection to its constitutionality."

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[1] Manchester Fire Ins. Co. *v.* Herriott, 91 Fed. Rep. 711; American Refrig. Trans. Co. *v.* Adams, 28 Col. 119, 63 Pac. Rep. 410; People *v.* Thurber, 13 Ill. 554; Walker *v.* Springfield, 94 Ill. 364; Home Ins. Co. *v.* Swigert, 104 Ill. 653; State *v.* Ins. Co. of North America, 115 Ind. 257; Phœnix Ins. Co. *v.* Welch, 29 Kan. 672; State *v.* Hammond Packing Co., 34 So. Rep 368; *Ex parte* Cohn, 13 Nev. 424; W. U. Tel. Co. *v.* Mayer, 28 Oh. St. 521; Germania Life Ins. Co. *v.* Com., 85 Pa. St. 513; Slaughter *v.* Com., 13 Gratt. 767; Blue Jacket Consol. Copper Co. *v.* Scherr, 50 W. Va. 533, 40 S. E. Rep. 514; Fire Department of Milwaukee *v.* Helfelstein, 16 Wis. 136.

[2] Goldsmith *v.* Home Ins. Co., 62 Ga. 379.

[3] State *v.* Sloss, 83 Ala. 93.

[4] Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566; McNall *v.* Met. Life Ins. Co., 65 Kan. 694, 70 Pac. Rep. 604.

[5] 18 Wall. 206.

The land and chattels of a corporation engaged in interstate commerce may always be taxed without infringing the constitutional provision.[1] And this is true even if the property is used to facilitate interstate commerce, like the rolling stock of a railroad,[2] or cabs maintained by the railroad for the use of interstate passengers.[3]

It has been seen that property in actual transit through a state cannot be taxed; but where the property is used for interstate or foreign commerce a tax levied on it before or after actual transit is unconstitutional. Thus property just imported into a state, and still in the form in which it was imported, cannot be taxed, as a tax would be an interference with interstate commerce. "Goods imported do not lose their character as imports and become incorporated into the mass of property of the state, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition."[4] For the same reason it is unconstitutional to tax chattels held in the state awaiting export. Goods lying ready for immediate shipment into another state are therefore not taxable.[5] But if the goods have arrived and are prepared for immediate use they may be taxed.[6] "The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the state, and as such it was taxable for the current year as all other property in the city of New Orleans was taxable."[7] So if it is awaiting shipment, not immediate, but

[1] Morgan *v.* Parham, 16 Wall. 471; Transp. Co. *v.* Wheeling, 99 U. S. 273; Ferry Co. *v.* East St. Louis, 107 U. S. 365; Atlantic & P. Tel. Co. *v.* Philadelphia, 190 U. S. 385, and cases cited.

[2] Marye *v.* B. & O. Ry., 127 U. S. 117; A. & P. Ry. *v.* Lesueur (Ari.), 19 Pac. Rep. 157; Carlisle *v.* P. P. C. Co., 8 Col. 320.

[3] People *v.* Knight, 171 N. Y. 354, 64 N. E. Rep. 152.

[4] FIELD, J., in Low *v.* Austin, 13 Wall. 29, 34. This case rests in part on the constitutional prohibition on the states to lay a tax on imports; and in a case where the property has been brought from another state the property is taxable at an earlier moment. See the distinction made in Brown *v.* Houston, 114 U. S. 622; Pittsburg, etc., Coal Co. *v.* Bates, 156 U. S. 577.

[5] Ogilvie *v.* Crawford Co., 7 Fed. Rep. 745; Blount *v.* Munroe, 60 Ga. 61; State *v.* Carrigan, 39 N. J Law 35.

[6] Brown *v.* Houston, 114 U. S. 622; Pittsburg, etc., Coal Co. *v.* Bates, 156 U. S. 577.

[7] FIELD, J., in Pittsburg, etc., Coal Co. *v.* Bates, 156 U. S. 577, 589.

at some time in the future.[1] Whether the time for immediate shipment has come is not always easy to determine. The best guide for the determination of the question is in the language of Bradley, J., in Coe *v.* Errol:[2] "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there if not taxed by reason of their being intended for exportation, but taxed without any discrimination in the usual way and manner in which such property is taxed in the state."

Whether railroad cars used upon a railroad in more than one state may constitutionally be taxed has been much argued. It was held in Pickard *v.* Car Co.[3] that a tax of fifty dollars on each car so used could not be imposed for the privilege of running the car through the state; but this was a tax on the business of commerce, not on the property. In Marye *v.* R. R.[4] there was a strong *dictum* to the effect that a state might probably tax such cars by proper legislation. Finally in Pullman's Palace Car Co. *v.* Pennsylvania[5] the question was decided. The car company, an Illinois corporation, had been taxed, according to a statute of Pennsylvania, upon such proportion of its capital stock as the miles of road upon which its cars were run in Pennsylvania bore to the whole number of miles of road upon which its cars were run. It was held by a majority of the court that cars run upon roads in Pennsylvania were situated in that state for the purpose of taxation, and that this was a proper way in which to tax the property of the company in such cars. There was a vigorous dissent.[6]

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[1] Diamond Match Co. *v.* Ontonagon, 188 U. S. 82.

[2] 116 U. S. 517, 525.

[3] 117 U. S. 34.

[4] 127 U. S. 117, 123.

[5] 141 U. S. 18. *Acc.* Union Ref. Transit Co. *v.* Lynch, 177 U. S. 149; State *v.* Canda C. C. Co., 85 Minn. 457, 89 N. W. Rep. 66. *Contra*, Central R. R. *v.* State Board of Assessors, 49 N. J. Law.

[6] The dissenting justices took the ground that no single car was permanently in Pennsylvania, and the *situs* of the cars was therefore no more in Pennsylvania than the

A tax proportioned to the number of passengers transported or freight carried is clearly a tax on commerce, and is bad;[1] and so is a tax on messages sent or received beyond the limits of the state.[2] If the effect of the state statute is to impose such a tax, the exact form of it is immaterial. A New York statute provided that the master of every vessel entering New York should either pay a small fee or enter into a bond for each passenger brought into the state. This was held to be unconstitutional.[3]

How far a tax upon the receipts of a corporation from interstate business may be taxed has not been altogether clear on the authorities. In 1873 the Supreme Court in the case of the State Tax on Railway Gross Receipts held that such a tax was valid.[4] But in a later case the authority of this case was shaken.[5] The case was distinguished from the State Tax on Railway Gross Receipts on two grounds: first, that in the earlier case the corporation taxed was a domestic corporation, but in the case at bar a foreign corporation; second, that in the case at bar the receipts taxed had never come into Michigan and there been mingled with the other property of the company. The tax was held invalid. This decision was followed, and the case of the State Tax on Railway Gross Receipts expressly disapproved, in Philadelphia Steamship Co. *v.* Pennsylvania,[6] where the state which chartered the corporation for interstate carriage attempted to tax the gross receipts, and the tax was held invalid. This case in turn was followed in Ratterman *v.* W. U. Tel. Co.,[7] in which it was attempted to tax the gross receipts of an interstate

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situs of a ferry-boat or other vessel is in the state at the shore of which it may touch. Hays *v.* S. S. Co., 17 How. 596; Morgan *v.* Parham, 16 Wall. 471; Transp. Co. *v.* Wheeling, 99 U. S. 273. The whole capital stock might be taxed in Illinois; and in this case the same property would therefore be taxable twice. W. U. Tel. Co. *v.* Mass., 125 U. S. 530, was distinguished on the ground that the property there taxed was fixed in the state of Massachusetts.

[1] The Passenger Cases, 7 How. 283; Crandall *v.* Nevada, 6 Wall. 35; Case of State Freight Tax, 15 Wall. 232; Erie Ry. *v.* New Jersey, 31 N. J. Law 531.

[2] Telegraph Co. *v.* Texas, 105 U. S. 460.

[3] Henderson *v.* Mayor of New York, 92 U. S. 259. MILLER, J., said: "To require a heavy and almost impossible condition to the exercise of this right [of landing passengers], with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum."

[4] State Tax on Railway Gross Receipts, 15 Wall. 284: followed in W. U. Tel. Co. *v.* Mayer, 28 Oh. St. 521; W. U. Tel. Co. *v.* Com., 110 Pa. St. 405.

[5] Fargo *v.* Michigan, 121 U. S. 230.

[6] 122 U. S. 326.

[7] 127 U. S. 411. *Accord* Ind. *v.* P. P. Car Co., 11 Biss. 561.

telegraph company; and it has been approved in several later cases.[1]

But in Maine *v.* Grand Trunk Ry.[2] the majority of the court reached a conclusion which seems to be opposed to the earlier cases. A statute of Maine required that every corporation, person, or association operating a railroad in the state should pay an annual excise tax for the privilege of exercising its franchises in the state. The amount of the tax was to be ascertained as follows: the gross receipts were to be divided by the number of miles of road operated, and the resulting average, multiplied by the number of miles operated within the state, was to be the basis of taxation. This statute was held not to be opposed to the Constitution of the United States. Field, J., who delivered the opinion of the court, said that the tax was expressly declared to be, and was, an excise tax for the privilege of exercising its franchises within the state of Maine; that it might be enacted, since the state had the right to exclude the corporation if a foreign one or refuse it the franchises if a domestic one; and that it was not a regulation of commerce, because it was not a direct tax on the receipts.[3]

This case also has been many times cited with approval. Some of the points apparently decided in it, however, can hardly be supported. The ground seemingly taken by the majority, that the tax might be supported as an excise tax for the privilege of coming into the state, is certainly unsound; for later as well as earlier cases agree that a state cannot exclude from its territory a corporation or an individual engaged in interstate commerce or in the service of the national government.[4] But the authority of

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[1] See Norfolk & W. R. R. *v.* Pa., 136 U. S. 114; Crutcher *v.* Ky., 141 U. S. 47.

[2] 142 U. S. 217.

[3] The opinion was given by Field, J. Bradley, Harlan, Lamar, and Brown, JJ., dissented.

[4] "Only two exceptions or qualifications have been attached to it [the right of a state to exclude a foreign corporation] in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than half a century ago in Bank *v.* Earle, 13 Pet. 519. One of these qualifications is that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 112. The other limitation on the power of the state is where the corporation is in the employ of the general government,—an obvious exception, first stated, we think, by the late Mr. Justice Bradley in Stockton *v.* Railroad Co., 32 Fed. Rep. 9. 14." Field, J. (who delivered the opinion in Maine *v.* Grand Trunk Ry.), in Horn Silver Mining Co. *v.* New York, 143 U. S. 305.

"A state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the general government,

the case being recognized, some more tenable ground must be found on which to place the decision. It will probably be found in the later case of Postal Telegraph Cable Co. *v.* Adams.[1] A statute of Mississippi laid upon all telegraph companies, domestic as well as foreign, a tax for the privilege of carrying on their business, graduated in each case upon the amount of property in miles and its value; and exempted them from all other taxation. It was found in the case that the burden of this tax was less than the ordinary tax on the same amount of property. The court said that although a franchise tax upon a corporation engaged in interstate commerce is invalid, and although this purported to be a franchise tax, yet the substance rather than the shadow was to be looked at. This tax was in lieu of another tax on property, and did in fact stand for a tax on the intangible property within the state, and it was therefore valid. And this same reasoning was applied in sustaining a "franchise" tax which was calculated upon the basis of the intangible property as well as the tangible property within the state,[2] and on the same principle it has been held in the converse case that, though the statute recites that the tax is in lieu of an ad valorem tax on property of the company located within the state, it is, if it exceeds the amount which could properly be levied under the property tax law, void as a regulation of commerce.[3]

Where a tax is laid upon such part of the receipts of an interstate carrier as are derived solely from business within the state, it is of course valid.[4] And so also is a license tax applied solely to business carried on by railroads exclusively within the borders of a state.[5] And it has been held that a tax assessed to a telephone company doing business within the state of seventy-five cents on every instrument in use, was, if the company was doing some intra-state business, valid as to those instruments used in such business.[6]

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either directly in terms or indirectly by the imposition of inadmissible conditions. Nevertheless the state may subject it to such property taxation as only incidentally affects its occupation, as all business, whether of individuals or corporations, is affected by common governmental burdens." FULLER, C. J., in Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688. For full collection of authorities see Atl. and Pac. Tel. Co. *v.* Phila., 190 U. S. 160.

[1] 155 U. S. 688, followed in W. U. Tel. Co. *v.* Taggart, 163 U. S. 1; Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194.

[2] Adams Express Co. *v.* Kentucky, 166 U. S. 171.

[3] Postal Tel. Cable Co. *v.* Richmond, 3 Va. Sup. Ct. Rep. 39, 37 S. E. Rep. 789.

[4] Pacific Express Co. *v.* Leibert, 142 U. S. 339.

[5] Nashville, C. & St. L. Ry. *v.* Ala. City, 134 Ala. 414, 32 So. Rep. 731.

[6] State *v.* Rocky Mt. Bell Tel. Co., 27 Mont. 394, 71 Pac. Rep. 311.

It was held in the time of Chief Justice Chase that a license fee laid equally upon all express companies and railroad companies doing business beyond the state was not an unconstitutional regulation of commerce.[1] But this case was overruled later; and it is now established that no state can compel a corporation by taxation to pay for the privilege of engaging in interstate commerce.[2] Thus it has been decided that a tax of fifty dollars on each car run by a foreign corporation through a state for the privilege of so running them is an unconstitutional regulation of commerce;[3] that a license tax on the establishment of an agency of a foreign corporation which is engaged in interstate commerce is an unconstitutional tax;[4] and that a statute requiring a foreign express company engaged in interstate commerce to pay a license fee and deposit a statement showing that it had a certain amount of capital, as a condition precedent to doing business within the state, was unconstitutional.[5]

The majority of the court, however, without referring to these decisions, later said that a state might enforce an excise tax as a condition of allowing a foreign railway company to run its trains into the state.[6] The case is to be sustained on another ground; but the *dictum* is unsound.[7]

It is of course clear that although a state may not exclude a corporation engaged in interstate commerce, it is not obliged to grant a franchise to such a corporation, as for instance to make it

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[1] Osborne *v.* Mobile, 16 Wall. 479. This was followed in state courts, *e. g.* W. U. Tel. Co. *v.* Richmond, 26 Gratt. 1.

[2] Leloup *v.* Mobile, 127 U. S. 640; Lyng *v.* Michigan, 135 U. S. 161; Atlantic & P. Tel. Co. *v.* Philadelphia, 190 U. S. 160 and cases cited.

[3] Pickard *v.* Car Co., 117 U. S. 34. But a tax of seventy-five cents on every telephone instrument in use has been held valid in a state court as to instruments used in intra-state business. State *v.* Rocky Mt. Bell Tel. Co., 27 Mont. 394, 71 Pac. Rep. 311. To like effect Postal Tel. Cable Co. *v.* Norfolk, 99 Va. 102, 43 S. E. Rep. 207.

[4] McCall *v* Cal., 136 U. S. 104; Norfolk & W. R. R. *v.* Pa., 136 U. S. 114; *contra*, People *v.* Wemple, 131 N. Y. 64.

[5] Crutcher *v.* Ky., 141 U. S. 47; State *v.* North. Pac. Exp. Co., 27 Mont. 419, 71 Pac. Rep. 404. The nice distinctions of fact that may arise in such a case are well shown by the case of Ficklen *v.* Shelby County, 145 U. S. 1. In that case the court, recognizing the correctness of the former decision, held that interstate commerce was not restricted to an unconstitutional extent by a statute taxing commission merchants upon their gross annual commissions, although in the case at bar all the commissions for the year had been earned upon consignments from other states. If instead of doing a general commission business the person taxed had acted as agent for a single foreign principal, the tax would have been invalid.

[6] Maine *v.* Grand Trunk Ry., 142 U. S. 217, criticised above.

[7] Horn Silver Mining Co. *v.* New York, 143 U. S. 305; Postal Tel. C. Co. *v.* Adams, 155 U. S. 688.

a domestic corporation. No fee exacted for the privilege of becoming a corporation under the law of the state can be contrary to the Constitution of the United States, whatever may be the business of the corporation.[1]

The franchise of the corporation, regarded as property, may however be taxed so far as it can be said to enter into the value of the property within the state, even if the corporation is engaged in interstate commerce, provided only it is not a franchise conferred by the United States.[2] The distinction between a tax upon the franchise and a license fee to do business is certainly a shadowy one;[3] but once the principle already considered[4] is established, that a foreign corporation may be taxed in a state, as upon its property actually there, upon its business capital, including franchise and good-will, it follows that such a tax assessed upon the franchise of a foreign corporation engaged in interstate commerce is valid as a mere tax on property within the jurisdiction.

When the state finds it necessary to furnish special police supervision for a foreign corporation engaged in interstate commerce, it may legally and constitutionally oblige the corporation to pay the reasonable expense of such supervision. Such expense need not necessarily be paid out of the general tax levy. The exaction of compensation for the supervision furnished is not a tax in any proper sense; it is compensatory, even though the amount is estimated and exacted in advance.[5]

It would seem then that a state tax upon a foreign corporation engaged in interstate commerce in order to be valid must fulfil two requirements: first, it must be levied equally upon domestic and foreign corporations; second, it must in substance be a means of making property within the state bear its share of the burdens of government. If the tax fails in either of these respects it is a tax on commerce, and is invalid.

Joseph H. Beale, Jr.

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[1] Ashley *v.* Ryan, 153 U. S. 436.

[2] Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688; Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194; Atlantic & Pac. Tel. Co. *v.* Philadelphia, 190 U. S. 160 and cases cited; Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., 118 Fed. Rep. 239; A. & P. Ry. *v.* Lesueur (Ari.), 19 Pac. Rep. 157; State *v.* W. U. Tel. Co., 165 Mo. 502, 655 S. W. Rep. 775; People *v.* Roberts, 158 N. Y. 168, 52 N. E. Rep. 1104.

[3] BRADLEY, J., in Leloup *v.* Mobile, 127 U. S. 640; LAMAR, J., in Railroad Co. *v.* Pennsylvania, 136 U. S. 114.

[4] *Supra*, p. 250.

[5] Western U. T. Co. *v.* New Hope, 187 U. S. 419; Atlantic & P. Tel. Co. *v.* Philadelphia, 190 U. S. 160.

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LITERARY PROPERTY AT COMMON LAW. — It was declared long since, in the leading cases of Donaldson *v.* Beckett[1] in England and Wheaton *v.* Peters[2] in America, that the copyright statutes secure to the producer of such literary property as is the subject of copyright, the only right of exclusive publication that exists after first publication. This has been uniformly reasserted; and, conversely, it is held that until such first publication an exclusive right does exist.[3] But what the cases mean by a publication is difficult to determine from the authorities. A schoolroom lecture,[4] or a private circulation of a book or design,[5] is not treated as a publication, as to republish under the circumstances is considered a breach of faith. Nor are public representations of dramas or public lectures publications.[6] Whether or not the exhibition of a painting in a public gallery is so is a doubtful question. The American cases seem to hold that it is.[7] Similarly a recent New York case holds that the filing of an architect's plans with the city building department is a publication. *Wright* v. *Eisle*, 83 N. Y. Supp. 888. An unrestricted distribution of a book, even though under the express condition that the distributees shall use it for reference only, is without doubt a publication.[8] These examples amply demonstrate that

[1] 2 Bro. P. C. 129.
[2] 8 Pet. (U. S.) 591.
[3] Palmer *v.* De Wit, 40 How. Pr. (N. Y.) 293; affirmed in 47 N. Y. 532.
[4] Caird *v.* Sime, 12 App. Cas. 326.
[5] Prince Albert *v.* Strange, 2 De G. & S. 652.
[6] Tompkins *v.* Halleck, 133 Mass. 32.
[7] Pierce, etc., Co. *v.* Werckmeister, 72 Fed. Rep. 54.
[8] Rees *v.* Peltzer, 75 Ill. 475.

publication in any ordinary sense is not the test. Long-continued public renditions of a drama or lecture may in fact publish it far more extensively than its sale as a book. What is really a confusion is the result of a flexible construction of the word "publication," amounting practically in some instances to the total abrogation of its meaning. This flexibility of construction is believed to be due to an inclination to circumvent as much as possible the original interpretation of the copyright statutes.

The result of this analysis has an important bearing on the much disputed question whether at common law as unaffected by statute there exists an exclusive right of publication in perpetuity. Intrinsically there might be. A man's ideas are his own until he imparts them to others, but then unquestionably they become irredeemably shared by the recipients. Yet the law, while recognizing that the ideas are no longer the author's alone, could nevertheless recognize a reservation by the author of the exclusive right of publication, and restrain any inconsistent use of those ideas. Whether it should refuse to restrain such a use is a question of policy, just as the law, for reasons of policy, refuses to enforce certain conditions attempted to be imposed on the alienation of tangible property. That the law does recognize and enforce such a condition to a limited extent in all cases of literary property seems clear from the authorities. The courts, while purporting to deny the common law right on account of the statute, by their varying construction of the word "publication," have in fact recognized its complete existence in certain cases. That there is such a common law right is further supported by a modern class of cases which hold that the most extensive publication of news by machines known as "tickers" does not destroy the exclusive rights of the original owner.[9] As ordinary news is not the subject of copyright, these cases must depend on common law principles. They are clearly right on policy. If a receiver of such news were allowed to republish by "tickers" of his own, it would be destructive to the continuance of this highly valuable mode of disseminating news, since the first company could not compete with rivals whom it supplied with information. It must be remembered that the copyright statutes themselves are a legislative recognition of the justice of the right of exclusive publication for a considerable period of time. Upon the whole, therefore, whatever the true effect of the copyright statutes, those cases seem sound which recognize a common law right of exclusive republication.

Dower in Mortgaged Land Redeemed and Sold by Executor for Payment of Debts. — By express statute in England, and by statutory enactment or judicial decision in most American jurisdictions, dower is allowed in an equity of redemption. Another common statute, enacted for the benefit of creditors, allows the court to order the executor to sell the testator's realty, if necessary, for the payment of his debts. By the weight of American authority, in some states regulated by statute, the mortgagee must realize first on his security, and then prove against the personal estate only for the excess of the mortgage debt over the value of the security.[1] Consistently with this rule of fairness to the general creditors, it has been

[9] National, etc., Co. *v.* Western, etc., Co., 119 Fed. Rep. 294; Kiernan *v.* Manhattan, etc., Co., 50 How. Pr. (N. Y.) 194.

[1] See Woerner, Administration, 2d ed., § 408.

held that the widow, having joined with her husband in the mortgage, cannot require the executor to exonerate the land out of the personalty.[2] For the same reason, moreover, an order of the court allowing the executor to sell the testator's realty does not allow him to discharge the mortgage and to sell the unincumbered land. Thus, on the settlement of his accounts, he is not entitled to a credit for the amount so paid in discharge of the incumbrance.[3] Similarly, the executor cannot maintain a bill to remove a cloud on the testator's title, inasmuch as his right is confined to the sale of the exact estate which the testator had.[4] If, now, the executor redeems, the legal title vests, by process of law, in the heirs and the widow. The purchaser, therefore, gets nothing, since the equity of redemption has disappeared and the legal title is in the heirs and the widow. What rights in equity the disappointed purchaser may have is a difficult question. One solution has been the following: The mortgage has been discharged by the officious act of the executor, and obviously there is no reason why the heirs should take the unincumbered land to the exclusion of the widow. As against the purchaser, also, who took no legal title at the executor's sale, there seems no reason for denying the widow's right to dower in the land. The conclusion of this reasoning is to give the widow dower in the land, because no other claimant shows a better right.[5] Such was the decision reached in a recent case. *Casteel* v. *Potter*, 75 S. W. Rep. 597 (Mo., Sup. Ct.).

This result, it is submitted, is undeserved as regards the widow, and unjust to the purchaser, whose purchase money went to discharge the incumbrance and to satisfy the testator's debts. The purchaser paid his money in the belief that he was getting a clear title. The legal title, however, could not be passed under an order of the court to sell merely the testator's realty, as that consisted only of an equity of redemption. The equity of redemption, moreover, which the executor could have sold subject to the widow's dower, was extinguished by the redemption and could not pass to the purchaser. The purchaser, it would seem, took nothing by the sale. But since the purchase money has been applied to the payment of the incumbrance and the debts of the testator, the purchaser should not be remediless. It has been held that the purchaser, as against the enriched estate, would be subrogated to the rights of the satisfied incumbrancer and creditors, and could exercise their right to demand that the land be sold to reimburse him.[6] The basis of the purchaser's right of subrogation is the satisfaction of the incumbrancer and the creditors out of the purchase money, which unjustly enriched the estate. A precisely similar case of unjust enrichment occurs when, without contribution, the widow gets dower in the unincumbered land; and the reasons for subrogation against the widow seem quite as strong. By this rule of subrogation, the mortgage, so to say, revives in equity, and the purchaser gets the mortgagee's right to keep the legal title till the amount of the incumbrance is reimbursed him, together with the right which the satisfied creditors had to have the equity of redemption sold for their benefit. It is unfortunate that the authority of an earlier Missouri decision[7] bound the court to deny a rule which combines substantial justice and sound principle.

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[2] Hewitt *v.* Cox, 55 Ark. 225.
[3] Pryor *v.* Davis, 109 Ala. 117.
[4] Phelps *v.* Funkhouser, 39 Ill. 401.
[5] Hastings *v.* Stevens, 29 N. H. 564.
[6] Blodgett *v.* Hitt, 29 Wis. 169.
[7] Jones *v.* Bragg, 33 Mo. 337.

POWER OF THE COURTS TO REVIEW POLICE REGULATIONS. — By the Fourteenth Amendment to the Constitution, no state shall "deprive any person of life, liberty, or property without due process of law." Each state, however, has the right under its police power to enact statutes for the regulation of public health, morality, or order, and, generally speaking, so long as this power is exercised for these purposes, the constitutionality of the legislative acts will not be questioned by the courts. But when, under guise of furthering these objects, statutes are passed which cannot fairly be said to be for this purpose, they must be set aside as violations of the Fourteenth Amendment.[1] These principles are well recognized, yet their application has been far from satisfactory, since in determining whether a statute is a legitimate exercise of the police power, the courts usually lay down the arbitrary rule that in the absence of anything on the face of the statute which their judicial knowledge shows to be unwarranted under the police power, the act cannot be questioned.[2] On this ground, statutes prohibiting the sale of oleomargarine have been upheld, the courts not having judicial knowledge that it was healthy, and refusing to consider evidence of the fact.[3] So, in a late Kentucky case, a statute making it a crime to sell milk from cows fed on a by-product of brewing called "still slop," was held valid. The court took the position that although such feed might be healthy, the *ipse dixit* of the legislature was conclusive, since there was nothing on the face of the statute which showed, within their judicial knowledge, that it was not in the interest of public health. *Sanders* v. *Commonwealth*, 77 S. W. Rep. 358 (Ky.). Although this decision seems correct, it clearly illustrates the unsatisfactory condition of the law in cases where the subject matter of the statute is not within judicial knowledge. Even if it might have been proved by evidence that still slop was perfectly healthy, so that the statute would not be within the police power, and therefore would really be unconstitutional, the general rule here laid down would prevent the court from recognizing that fact.

The rule is defective, since it affords no constitutional protection in the case of any newly discovered or little known industry, however harmless. Moreover, it limits the extent of the court's power by the extent of their judicial knowledge, and is thus uncertain, for matters not now of common knowledge may later become so. Thus in the more recent oleomargarine cases, the courts seem to have taken judicial cognizance of the fact that oleomargarine is a recognized article of food and commerce within the meaning of the inter-state commerce law.[4] In view of these two defects, it is submitted that to secure perfect protection under the constitution and a uniform rule, this power of reviewing the legislative action should extend to every case in which the statute may be shown by evidence, as well as by judicial knowledge, not to be a permissible exercise of the police power. This is virtually what has been done in New York.[5] And in spite of the general rule, it is in fact by no means uncommon for the courts in cases of this kind to consider the particular facts.[6] If judicial knowledge fails to disclose whether a statute is a legitimate exercise of the police power, evidence

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[1] People *v.* Gillson, 109 N. Y. 389; Town of Lakeview *v.* Rose Hill Co., 70 Ill. 191.

[2] State *v.* Layton, 160 Mo. 474.

[3] Powell *v.* Pennsylvania, 127 U. S. 678; Butler *v.* Chambers, 36 Minn. 69.

[4] Schollenberger *v.* Pennsylvania, 171 U. S. 1; *Ex parte* Scott, 66 Fed. Rep. 45.

[5] People *v.* Marx, 99 N. Y. 377.

[6] Munn *v.* Illinois, 94 U. S. 113, 130; Morgan *v.* King, 35 N. Y. 454.

should be introduced to enlighten the judicial mind. The abuse of power depends on facts, which can be determined as well as any other facts. Only by this means can adequate protection be extended to newly discovered industries, and a line of decisions, unsound in the light of later experience, be avoided by the courts.

The Immunity of Government Vessels from Arrest. — It is well established law that, speaking generally, the vessels of a foreign government in the hands of that government's servants are not liable to arrest.[1] The courts have arrived at this result, first, by saying that it would be inconsistent with the nature of sovereignty, if the foreign government were to be deprived of its own property by its own courts. On principles of international courtesy, courts of one jurisdiction should extend this immunity to vessels of another jurisdiction. This reasoning, of course, covers and settles the case where a government vessel is sought to be libelled in the local jurisdiction. It has, accordingly, been assumed that a vessel in this latter case would not be liable to arrest. Two very great authorities, however, have thought that this immunity of government vessels should extend only to those vessels employed in services of an essentially public nature, such as warships and vessels of the revenue service. Sir Robert Phillimore argued that when the ship of a sovereign is engaged in private ventures, the immunity should be regarded as waived.[2] Mr. Justice Story was of opinion that, since the owner in these cases may not be impleaded, there is the greater reason for allowing the action against the ship;[3] a reason, however, which seems to apply equally well to the case of a vessel in public service.

The Judicial Committee of the Privy Council has just had occasion to pass upon these questions. A ferryboat, which they regarded as the property of the crown in the hands of its servants, destined for service in the operation of a government railway, being disabled on the high seas, was towed into port. Their Lordships were of opinion that she could not be libelled for salvage, both because she belonged to the crown, and because it would necessarily implead the sovereign. *Young* v. *Steamship Scotia*, 89 L. T. 374. Waiving any discussion of this second ground, this important case would seem to go far towards settling the law in opposition to the opinions of Phillimore and Story. It is submitted that the position taken by the court is a sound one. The difficulty with the opposite view is jurisdictional, existing in the nature of things. To take property of the government out of its possession is a derogation of its sovereign rights. This derogation is not lessened by holding that the government has waived its immunity, when as a matter of fact it appears by its proper officer and declares that it has not. The argument of Mr. Justice Story does not even attempt to meet this difficulty. Nor are the practical advantages entirely with him. If a government ferryboat can be arrested, so can a government mail wagon. In view of the increasing participation by the government in private industries, convenience as well as principle seems to demand that the immunity be preserved.

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[1] The Exchange, 7 Cranch (U. S.) 116.
[2] See The Charkieh, L. R. 4 A. & E. 59.
[3] See U. S. *v.* Wilder, 3 Sumn. (U. S. C. C.) 308.

THE PAROL EVIDENCE RULE. — Evidence is excluded, broadly speaking, on one of two grounds — either because the fact which it tends to prove is irrelevant, or because, though the fact is relevant, the law does not allow it to be proved by this means.[1] In the first case, the evidence is rejected because of the substantive law; in the second, because of the law of evidence. In general, a fact is irrelevant because the law declares that it is, under the circumstances, of no consequence: thus, evidence that a person accused of manslaughter had no intent to kill is inadmissible, because the law says that the want of specific intent is no defense in a prosecution for manslaughter.[2] Though the result in this case is stated in terms of evidence, yet it is plain that the exclusion is not due to anything in the law of evidence, but to the substantive law of homicide. And if evidence which is thus irrelevant, by reason of the substantive law, is introduced without objection, the court should instruct the jury to disregard it.[3] On the other hand, it is a familiar principle that, if testimony is offered which is relevant but repugnant to some rule of evidence, it must be objected to at once; otherwise the objection will be considered waived.[4] For example, if hearsay is introduced without objection, the jury may give the evidence such weight as they see fit.[5]

When, therefore, extrinsic evidence tending to vary a written contract is admitted without objection, the question of whether the jury should, nevertheless, be instructed to disregard it depends on the view taken of the scope of the parol evidence rule. Does it declare that the fact offered to be proved is irrelevant, or does it simply forbid the proving of the fact in a particular way? Is this, in short, a rule of substantive law or a rule of evidence? It is submitted that extrinsic evidence is rejected because it is irrelevant. It is not a question as to how the outside agreement is to be proved; in any case, the law says that the parties are bound by the terms of the writing and that no outside agreement can affect their liability.[6] This has been distinctly held in the case of a bond,[7] and there seems to be no logical distinction for this purpose between a bond and a simple contract. Hence the jury should be instructed to disregard the extrinsic evidence, even though no objection was made to its introduction, and it is so held in a recent case in the Circuit Court of Appeals. *Pitcairn* v. *Philip Hiss Co.*, 125 Fed. Rep. 110 (C. C. A., Third Circ.). The subject, however, is so constantly discussed in terms of evidence that it is often assumed that there is no difference in kind between the parol evidence rule and the various rules of evidence. Thus, a late New York case holds that parol evidence, once admitted without objection, is in the record for all purposes. *Union Bank of Brooklyn* v. *Case*, 84 N. Y. Supp. 550. But, in this case as well as in several others reaching the same result,[8] the point under consideration seems to have been taken for granted. If the nature of the parol evidence rule is once fairly examined, there seems to be no answer to the reasoning of the Federal court.

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[1] See Thayer, Prel. Treat. on Ev., 265.
[2] State *v.* Vines, 93 N. C. 493.
[3] Utter *v.* Vance, 7 Blackf. (Ind.) 514.
[4] Barton Coal Co *v.* Cox, 39 Md. 1.
[5] Sherwood *v.* Sissa, 5 Nev. 349.
[6] See Thayer, Prel. Treat. on Ev. 390 *et seq.*
[7] Lucas *v.* Beebe, 88 Ill. 427.
[8] Frauenthal *v.* Bridgeman, 50 Ark. 348; Tebbs *v.* Weatherwax, 23 Cal. 58; Zabel *v.* Nyenhuis, 83 Ia. 756.

Accord and Satisfaction by Operation of Law. — The American courts in the past decade have generally followed the leading New York case of Fuller *v.* Kemp[1] in holding that when a sum of money, tendered by a debtor to his creditor on express condition that it be received in full satisfaction of an unliquidated or disputed claim, is retained by the debtor, an accord and satisfaction results, even though the creditor immediately protests that the sum is not taken in full satisfaction, but only on account. The New York Supreme Court in two recent cases has had occasion again to pass upon the point. *Mack* v. *Miller*, 84 N. Y. Supp. 440; *Laroe* v. *Sugar Loaf Dairy Co.*, 84 N. Y. Supp. 609. In the former case the court declared that the condition upon which the check was tendered was not made sufficiently clear to the creditor to bring the case within the rule, while in the latter, the facts being similar to those of Fuller *v.* Kemp, the court found an accord and satisfaction. The same rule was applied in a recent Mississippi decision. *Cooper* v. *Yazoo, etc., R. R. Co.*, 35 So. Rep. 162.

It is difficult to see upon what legal principle the result reached by these cases can be supported. An accord is a species of contract, and requires mutual assent, — an offer on the one side and an acceptance on the other. The courts agree to this, but hold that in this class of cases an acceptance must be conclusively presumed from the act of the creditor. It is said that the creditor's action in retaining the sum tendered is open to but one inference, namely, that the condition has been accepted. This is, however, in a sense, a misstatement of the situation. It is not true that the creditor has no alternative but to accept the condition or return the sum tendered. He may take a third course, attempt to apply the sum on account, and thus lay himself open to an action for conversion. Though the property of the debtor is lawfully in his hands, the creditor may not, without the debtor's assent, apply it in payment of the debt, and the retention of the property after demand is an actionable conversion.[2] The damages ordinarily recoverable in trover for conversion are the value of the property converted, but under the American rule, where the conversion operates as an accord and satisfaction, the actual damages suffered by the creditor as a result of his act of conversion are likely to be very much greater. In one New York case[3] the creditor lost by retaining a check sent him in full satisfaction four-fifths of his claim, the whole of which a jury stood ready to give him.

Of course it may well be urged, on the other hand, that the courts have been led to adopt this rule by their disposition to favor offers of compromise, and perhaps more particularly by their feeling that the remedy in a case of conversion is wholly inadequate as a means of doing justice to the debtor. Still it cannot be denied that the rule of Fuller *v.* Kemp affords the opportunity to a sharp business man frequently to avoid his just debts by inducing his unwary creditors to retain a check for a small amount sent upon condition that it be payment in full. It seems a matter for regret, therefore, that most American courts have not followed those of England[4] and Massachusetts[5] in holding in all such cases that whether or not certain acts of a creditor show the acceptance of an offer of a contract of accord is a question of fact for a jury.

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[1] 138 N. Y. 231.
[2] Precker *v.* London, 73 N. Y. Supp. 145.
[3] Nassoiy *v.* Tomlinson, 148 N. Y. 326.
[4] Day *v.* McLea, 22 Q. B. D. 610.
[5] Tompkins *v.* Hill, 145 Mass. 379.

PUBLIC RIGHTS IN MUNICIPAL STREETS BARRED BY EQUITABLE ESTOPPEL. — Statutes of limitations, unless by express provision, do not operate against the state.[1] A technical argument advanced in support of this doctrine is that as the sovereign can do no wrong, so also the sovereign cannot be negligent.[2] It would seem, however, that the statute of limitations does not rest on any assumption of negligence in the owner of property, but rather on the policy in favor of securing repose of rights.[3] A better reason, therefore, why the statute does not operate against the state, is that the protection of public rights rests largely in the people, who, on account of individually slight interests, often would raise no objection to the user of an adverse claimant.[4] If it were not for this rule, public rights, on account of the inadequacy of protection, would be subject to continual diminution. The policy in favor of securing public rights from the operation of the statute is, therefore, greater than that in favor of securing repose.

When, however, the question is raised against a municipal corporation with regard to rights that it holds in trust for the public, such as the streets, it has been insisted that the great number of people within a narrow compass, continual use, and the existence of municipal authorities who are able to watch the public interests, are facts which will sufficiently guard the public, and the rule ought to be varied. There is obviously much force in the argument. The result is that there is a decided conflict of authority on the question.[5] But even if the courts refuse to apply the statute against a city, yet when the facts are that an individual, acting in good faith, has encroached on a public street, and has without objection substantially changed his position by building or improving his property with reference to his supposed rights, it may be contended with much greater force that his rights should be protected. This may be done by raising an equitable estoppel against the city. Accordingly it has been so held in a line of cases where the private rights were found to be of "more persuasive force in the particular case than those of the public."[6] This result was reached in a recent Illinois case. *Village of Winnetka* v. *Chicago, etc., Ry. Co.*, 68 N. E. Rep. 407. The doctrine of equitable estoppel is often used in adjusting private rights,[7] and if the policy is strong enough, there would seem to be no objection to its application against the public.[8]

The rule represents a compromise between preferring individual rights against the public in no instance, and applying the statute of limitations against municipal corporations in all cases. As the whole subject of acquisition of rights as against the public is one that must depend on the balance of policies, the compromise is perhaps the safer rule. In view of its adoption in a considerable number of cases, it may be fairly considered to have become an important doctrine to be dealt with in the consideration of cases of this class.

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[1] Commonwealth *v.* Moorehead, 118 Pa. St. 344.
[2] Armstrong *v.* Morrill, 14 Wall. (U. S.) 120.
[3] See Roberts *v.* Pillow, 1 Hempst. (U. S. C. C.) 624, 642.
[4] See Wheeling *v.* Campbell, 12 W. Va. 36.
[5] Dill. Mun. Cor. 4 ed. § 674; Cross *v.* Mayor of Morristown, 18 N. J. Eq 305; Wheeling *v.* Campbell, *supra*.
[6] *Ibid.* § 675.
[7] Storrs *v.* Barker, 6 Johns. Ch. (N. Y.) 166.
[8] See 15 HARV. L. REV. 737.

Tort Liability of a Vendor of Chattels to Others than his Vendee. — The advisability of holding the negligent maker or vendor of a chattel liable to some person other than the vendee has given rise to a confused list of decisions. It seems fairly settled, however, that a person not privy to the contract cannot recover for an injury caused him by the seller's negligence, unless the article sold is one dangerous to human life.[1] This doctrine rests upon the ground that in the case of ordinary articles there is no duty to any but the vendee, while in the case of dangerous articles there is a duty towards all who may reasonably be expected to use them. It might be urged that the danger is reason for greater care rather than wider liability, and that there is a like duty owing in all cases, whether the articles be dangerous or not; but such a theory finds, unfortunately, frail support, and much of the authority commonly cited in its favor has gone upon the ground that the defendant sold not merely with negligence, but with actual knowledge of the defect.[2]

Accepting the law as it apparently stands, the crucial point is to decide what articles are dangerous to life. It has necessarily been held that poison [3] is dangerous; while a stage-coach,[4] a fly-wheel,[5] and a steam-boiler [6] are not. On the other hand a scaffolding has twice been held a dangerous article,[7] and it is difficult to see why a fly-wheel or a steam-boiler is intrinsically safer than a scaffolding, or why any of them is not as dangerous as food the negligent preparation of which rendered a seller liable at the suit of the vendee's guest.[8]

Upon this perplexity some light is thrown by two decisions lately reported. In the first, a land-roller defectively constructed by the defendant company was resold to the plaintiff, who was injured owing to the defect. The New York court gave judgment for the defendant, on the ground that a roller, though it may be dangerous if defective, is not inherently so. *Kuelling* v. *Roderick Lean Mfg. Co.*, 84 N. Y. Supp. 622. In the second case the Michigan court under similar circumstances decided that diseased hogs were dangerous articles, and allowed recovery by the sub-vendee. *Skinn* v. *Reutter*, 97 N. W. Rep. 152. In both cases there was knowledge of the defect, but the courts seem to have preferred to decide upon the common principles of negligence, rather than on that particular fact. The cases are therefore useful as presenting two distinct tests of danger.

The test applied by the New York court is the nature of the article in its ordinary state; the test of the Michigan court is the nature of the article in its defective state. The latter test seems preferable. First, it is more accurate, since a seller is liable because he negligently endangers the public, and this depends not on what the article he sells would be if in proper condition, but upon what it actually is. Secondly, it is the more convenient, for it greatly reduces the difficulty in deciding what are dangerous articles. Lastly, the Michigan test is the more just, since it tends to broaden the scope of the existing rule, which is, in any event, too narrowly restricted.

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[1] Winterbottom *v.* Wright, 10 M. & W. 109; Thomas *v.* Winchester, 6 N. Y. 397.
[2] Lewis *v.* Terry, 111 Cal. 39.
[3] Thomas *v.* Winchester, *supra.*
[4] Winterbottom *v.* Wright, *supra.*
[5] Loop *v.* Litchfield, 42 N. Y. 351.
[6] Losee *v.* Clute, 51 N. Y. 494.
[7] Coughtry *v* Globe Woolen Co., 56 N. Y. 124; Devlin *v.* Smith, 89 N. Y. 470.
[8] Bishop *v.* Weber, 139 Mass. 411.

THE POLICE POWER AND THE PUBLIC TASTE. — The obligation on the owner of property that his use of it shall not be injurious to the community, is no greater than the public welfare demands. The scope of the legislative power depends, then, on how we define that public welfare which the state is interested in preserving. This, however, is a matter depending so much on custom, the habits of the people, and the varying needs of the community, as applied to a multitude of details, that no clear rule can be laid down; and courts have preferred to leave the term undefined, except by the gradual process of judicial inclusion and exclusion, as the decisions of particular cases required. These decisions up to the present time in America are usually said to have protected only morals and the purely physical or material welfare of the community. Whether or not a similar protection should be extended to what might be called the æsthetic welfare of the community is suggested by a recent case. A statute gave park commissioners power to prohibit the exhibition of advertisements upon lands fronting on the public parks of the city of New York. The court declared by way of *dictum* that this statute was not a valid exercise of the police power. *People* v. *Green*, 85 N. Y. App. Div. 400.

What shall be the scope of the legislative or police power seems to be chiefly a question of what is reasonable. It is true that there are certain objects of legislation which are so highly desirable that any enactment which may fairly be said to further those ends is therefore reasonable and within the police power. Thus restrictions to preserve the public health or morals are always good.[1] But these do not exhaust the objects of proper legislative restriction. Mere public comfort is enough,[2] or convenience in distributing public burdens;[3] nor are cases wanting where the mere greater benefit to the public as compared with the smaller private harm has made the law reasonable and therefore good, although the object aimed at was not one of the well-recognized and defined objects of proper legislation.[4] Nor is it necessary that the exercise of power be such as has always been exercised. That to which we have been accustomed usually seems to us more reasonable, and the circumstance has great weight with the courts, but it is not necessary.[5] Indeed what is reasonable obviously varies with different periods and places, and measures to which one generation is indifferent may become, as civilization advances, a public good to another. Whether or not the New York opinion is right depends, therefore, upon contemporary common-sense. Is the "fitness" of the regulation "so obvious that all well-regulated minds will regard it as reasonable"?[6]

Some regulation for the protection of the public's æsthetic sensibilities will probably be allowed. Certainly there is a Massachusetts *dictum* to that effect,[7] asserting that the height of buildings might be regulated to preserve the beauty of a city square. It would certainly seem that patent-medicine advertisements exhibiting horrid sores or other loathsome diseases might be prohibited, although the public morals or health would not be involved. Whether merely hideous signs could be prohibited in certain special localities is a more doubtful question. As our American cities and their popu-

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[1] Powell *v.* Pennsylvania, 127 U. S. 678.
[2] State *v.* White, 64 N. H. 48.
[3] Paxon *v.* Sweet, 13 N. J. Law 196; Carthage *v.* Frederick, 122 N. Y. 268.
[4] Commonwealth *v.* Alger, 7 Cush. (Mass.) 53.
[5] Knoxville Iron Co. *v.* Harbison, 103 Tenn. 421, *affirmed* 183 U. S. 13.
[6] SHAW, C. J., in Commonwealth *v.* Alger, *supra*.
[7] Attorney General *v.* Williams, 174 Mass. 476, 478.

lations advance in education and culture, many regulations, certainly, will become possible that a few years before would have been preposterous. It would be interesting to know how the New York court would have decided this question if it had been squarely before it.

Subrogation in behalf of a Surety's Surety. — The right of a surety, when compelled to pay the debt, to be subrogated as against the principal debtor to the position of the creditor is, as a general proposition, unquestioned. While this right is often co-ordinate in its usefulness with the surety's other remedies of indemnity and exoneration, still its use frequently has obvious advantages. This is true when the principal is insolvent and the creditor holds securities,[1] or has a claim of especial dignity against the principal.[2] Like the surety's remedies of indemnity and exoneration, subrogation is equitable in its nature, and is accorded the surety to secure reimbursement.[3] It finds its justification in the fact that, as between principal and surety, the former is the only real obligor. The surety, while bound to the creditor, is not intended to bear the burden of the obligation. When, therefore, at the whim of the creditor, he is forced to liquidate his legal obligation, equity will prevent his suffering, and will throw the burden where it belongs.

The extent of this remedy of subrogation has been subject to some misapprehension in its application to a surety's surety. Thus in an early New York case,[4] it was held that a plaintiff who had become a surety to another, at the latter's instance, could not, on account of a defense in favor of the principal against the latter, claim subrogation against the principal. The court apparently proceeded on the ground that, as the plaintiff had become a surety at the request of the first surety only, and not at the request of the principal, he could stand in the position only of the first surety. The argument, however, fails to comprehend the situation. The primary feature to be noticed is that the principal, the first surety, and the surety to the surety are equally bound as obligors to the creditor. He can throw the burden of the obligation, in the first instance, on any one of them. The next and the important feature is that, in their relation to the principal debtor, the first surety and the surety to the surety stand as co-sureties. This is clear from the fact that the second surety became equally liable with the first surety. This legal obligation he was willing to assume because of the private agreement of suretyship between himself and the first surety. That the plaintiff did not become a surety at the request of the principal is unimportant. A party who becomes a surety even in the face of an express refusal by the principal to receive him as such, is nevertheless entitled to subrogation.[5] The equity of subrogation is not the result of contract, but of the burden of being compelled to pay another's debt. Upon analysis, therefore, since the plaintiff is a surety to the principal debtor, it follows that he is entitled to the ordinary surety's right of subrogation.

This right is recognized in the Virginia case of Leake *v.* Ferguson,[6] and

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[1] Goddard *v.* Whyte, 2 Gif. 449.
[2] Lidderdale *v.* Robinson, 12 Wheat. (U. S.) 594.
[3] Succession of Dinkgrave, 31 La. An. 703.
[4] New York State Bank *v.* Fletcher, 5 Wend. (N. Y.) 85.
[5] Mathews *v.* Aiken, 1 N. Y. 595.
[6] 2 Gratt. (Va.) 419.

it is gratifying to note that the opinion expressed in a recent New York case is contrary in effect to the earlier decision. *Kolb* v. *National Surety Co.*, 176 N. Y. 233. This latest conclusion is sound in theory, and it avoids the unfortunate result of allowing the creditor, at his caprice, to throw the burden of the obligation on an innocent party.

RECENT CASES.

ACCORD AND SATISFACTION — ACCEPTANCE OF PART PAYMENT STIPULATED TO BE PAYMENT IN FULL. — The defendant sent the plaintiff a check in payment of an unliquidated debt, saying, "I think this pays you well for what you have done for me. You insisted on my fixing the price." The plaintiff retained the check, and wrote the defendant that he applied it on account and did not take the amount in full settlement. *Held*, that the acceptance of the check does not constitute an accord and satisfaction. *Mack* v. *Miller*, 84 N. Y. Supp. 440.

The defendant sent checks as monthly payments on a contract, stating that they were to be in full of account. The plaintiff, who had previously declared that if sums of the amount sent were paid they could only be placed on account, retained the checks, making a protest the first month only. *Held*, that the facts show an accord and satisfaction. *Laroe* v. *Sugar Loaf Dairy Co.*, 84 N. Y. Supp. 609.

The defendant's agent tendered to the plaintiffs a certain amount in full settlement of a disputed claim. The plaintiffs accepted the sum tendered and signed a receipt in full, but stated to the defendant's agent at the time that they did not waive their right to the balance. *Held*, that there is an accord and satisfaction. *Cooper & Rock* v. *Yazoo, etc., R. R. Co.*, 35 So. Rep. 162 (Miss.). See NOTES, p. 272.

ADMIRALTY — HARTER ACT — WHAT CONSTITUTES "ERROR IN MANAGEMENT." By § 1 of the Harter Act (U. S. Comp. St. 1901, p. 2946) a vessel is responsible for damages arising from negligence in loading, care, "or delivery" of property committed to its charge. By § 3 the vessel is relieved from responsibility for damages "resulting from faults or errors in navigation or in the management of said vessel." A vessel reached port in winter with some two hundred tons of ice on deck. Through the negligent discharge of part of the cargo she became top-heavy, rolled over, and sank at the dock. *Held*, that the vessel is responsible for damages to the cargo still on board. *The Germanic*, 124 Fed. Rep. 1 (C. C. A., Second Circ.).

The property damaged was not that part of the cargo already unloaded, but the part of which the delivery was not yet begun. There could, therefore, be no negligence in its "delivery." The facts seem rather to bring the case under the third section, which exempts the vessel from liability. The "management" of a vessel includes the control of everything with which the vessel is equipped for the purpose of protecting her and her cargo against inroads of the sea. *The Silvia*, 171 U. S. 462. In a real sense the cargo itself serves this purpose, acting as the ballast which is necessary to the vessel's safety. Negligence in the handling of the cargo, therefore, might well be regarded as an "error in management." It is immaterial that the error was committed while the vessel was in port. *The Glenochil*, [1896] P. D. 10; *cf. Rowson* v. *Atlantic Transport Co.*, [1903] 1 K. B. 114.

ADMIRALTY — IMMUNITY OF GOVERNMENT VESSELS FROM ARREST. — A steam ferry-boat, built for the Crown, to be used in the operation of a railway managed by the government of the Dominion of Canada, was disabled on the high seas and towed into port. She was at the time in the course of being delivered by the builders and was the property of the Government. *Held*, that the vessel may not be libeled for salvage. *Young* v. *Steamship Scotia*, 89 L. T. 374 (Eng., P. C.). See NOTES, p. 270.

ADVERSE POSSESSION — CONTINUITY OF ADVERSE POSSESSION — TACKING. — A man held land adversely for fifteen years and died. His widow continued to occupy until her death many years later. The plaintiff claims through the heirs of the husband against the defendant in possession, who claims by deed from the widow. The court instructed that the plaintiff could tack the two possessions in order to satisfy the

twenty years statute of limitations and thus prove title in himself. *Held*, that the instruction is correct. *Atwell* v. *Shook*, 45 S. E. Rep. 777 (N. C.).

This case, although granting that by the law of the jurisdiction a certain privity of claim is necessary for tacking, refuses to follow the weight of authority, which holds that the privity between a deceased husband and a widow is insufficient. Most courts argue that since the widow has no right in the land before dower is assigned, her entry is a new disseisin. *Sawyer* v. *Kendall*, 10 Cush. (Mass.) 241. It is hard to reconcile this position, however, with the many authorities holding that in the absence of distinct notice of an adverse claim the widow does not hold in opposition to the heirs. *Cook* v. *Nicholas*, 2 Watts & S. (Pa.) 27. Under these decisions she is to be regarded as claiming, not as a disseisor, but under the heirs. Such is her actual intent in most cases. The widow's holding, if under the heirs, could be tacked, as the privity between heir and ancestor is sufficient. *Alexander* v. *Gibbon*, 118 N. C. 796. The principal case, therefore, in view of the true nature of the widow's holding, rightly allows her possession to be tacked to her husband's.

BANKRUPTCY — EXEMPTIONS — INSURANCE POLICY. — A bankrupt owned a life insurance policy exempt under state laws from the claims of creditors. *Held*, that it is therefore exempt under the national Bankruptcy Act. *Pulsifer* v. *Hussey*, 97 Me. 434.

For a discussion of the point involved, see 14 HARV. L. REV. 618.

BANKRUPTCY — PREFERENCES — FRAUDULENT CONVEYANCES. — A person against whom a petition in bankruptcy was filed had within four months conveyed property to one of his creditors, with the secret purpose to defraud the rest of his creditors. The creditor had no reason to suspect the fraudulent purpose. *Held*, that the conveyance is voidable by the trustee in bankruptcy. *Sherman* v. *Luckhardt*, 74 Pac. Rep. 277 (Kan.).

The transfer in the principal case clearly gave the defendant a preference. Under the Bankruptcy Act of 1898, §§ 57 a, 60 g, preferences are voidable only when the grantee had reasonable cause to believe that the debtor was insolvent. The transfer, then, cannot be impeached under these sections. The court however holds that the transfer is bad under § 67 e, which provides that all conveyances by a bankrupt within four months of bankruptcy with intent to defraud his creditors, are bad except as to purchasers in good faith for a present fair consideration. This provision is almost identical with that of Stat. 13 Eliz. c. 5, in regard to fraudulent conveyances, which is held not to apply to preferences. *Twyne's Case*, 3 Coke 80 b. It seems probable that the meaning of this provision in the Bankruptcy Act is the same, since otherwise all the provisions in regard to preferences would be rendered entirely nugatory, and a preference of any sort would be voidable. Two recent cases which reach a result contrary to the principal case seem to express the more logical view. *Congleton* v. *Schreihofer*, 54 Atl. Rep. 144 (N. J.); *Gamble* v. *Elkin*, 54 Atl. Rep. 782 (Pa.).

CHECKS — ACTION BY HOLDER AGAINST DRAWEE OF UNACCEPTED CHECK. — *Held*, that the holder of an unaccepted check may bring suit thereon against the bank on which it is drawn. *Bloom* v. *Winthrop State Bank*, 96 N. W. Rep. 733 (Ia.).

It is well established that the relation between a bank and a depositor is that of debtor and creditor. *Bank of Republic* v. *Millard*, 10 Wall. (U. S.) 152. There being no privity of contract between the holder of the check and the bank, the holder cannot sue the bank unless on the theory of an assignment by the drawer of his claim. It is settled that an ordinary check cannot operate as an assignment at law. *Attorney-General* v. *Continental Life Ins. Co.*, 71 N. Y. 325. A few states, however, consider it an equitable assignment. *Union Nat. Bank* v. *Oceana County Bank*, 80 Ill. 212. Iowa has been thought not to be one of these states. ZANE ON BANKS AND BANKING, § 147. The present case seems to settle the Iowa law to the contrary. The equitable assignment theory is open to the objection that it is not consistent with negotiability. An instrument containing an order to pay out of a particular fund is not negotiable. *Josselyn* v. *Lacier*, 10 Mod. Rep. *294. It is hard to see how a check can be an assignment of the fund out of which, if it is to be negotiable, it must not be made payable. Furthermore, the great weight of authority is against the view that a check is an equitable assignment. *Dickinson* v. *Coates*, 79 Mo. 250.

CONSIDERATION — VOLUNTARY PROMISES ACTED UPON. — The defendant company subscribed to a certain fund which was to be used by the plaintiff in preventing frauds connected with the trade in which the defendant was engaged. After the plaintiff had spent certain sums in pursuance of this plan, the defendant refused to pay its subscription. *Held*, that the defendant is liable. *Heinrich* v. *Missouri & Illinois Coal Co.*, 76 S. W. Rep. 674 (Mo., Ct. App.).

The case proceeds upon the ground that although the defendant's promise was voluntary, yet when it was acted upon by the plaintiff he was entitled to enforce the promise in order to reimburse himself. This accords with the weight of authority in the United States. *Homes* v. *Dana*, 12 Mass. 190; *Pitt* v. *Gentle*, 49 Mo. 74. Upon theory, however, it is difficult to find any consideration for the defendant's promise. An act is not consideration merely because it is done on the faith of a promise, but only when it is done in return for the promise, the act done being actually bargained for. *In re Hudson*, 54 L. J. Ch. 811. In the present case no intent to make a bargain appears. The breaking of subscription promises may undoubtedly cause great hardship, but it does not satisfactorily dispose of the difficulty to hold them binding through the invention of consideration which does not in fact exist. It is preferable to hold with the New York decisions that voluntary subscriptions cannot be enforced. *Presbyterian Church* v. *Cooper*, 112 N. Y. 517; *In re Hudson*, *supra*.

CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACT — COMPETITION BY CITY WITH HOLDER OF FRANCHISE. — A state statute authorized cities to erect electric lighting plants, with a proviso that the right might be delegated. The plaintiff company was chartered by a city to erect and maintain such a plant for twenty years. Before the expiration of this time the city council voted to erect a municipal plant, to be maintained in competition with the plaintiff's. *Held*, that this is not an act under state authority impairing the obligation of contract. *City of Joplin* v. *Southwest Mo. Light Co.*, 24 Sup. Ct. Rep. 43.

This holding reverses the decision in the circuit court, which was discussed in 16 HARV. L. REV. 68.

CONSTITUTIONAL LAW — INTERNAL REVENUE — STAMP TAX ON SHIP'S MANIFESTS. — Under the War Revenue Act of June 13, 1898, a graduated stamp tax is laid on manifests of the cargoes of foreign-bound vessels. *Held*, that the tax is in violation of the constitutional prohibition of taxes or duties on articles exported from any state, and is void. *New York, etc., Co.* v. *United States*, 125 Fed. Rep. 320 (Dist. Ct., S. D. N. Y.).

Since the power to regulate foreign commerce includes the right to tax, Congress may lay tonnage duties on foreign-bound vessels. *Aguirre* v. *Maxwell*, 3 Blatchf. (U. S. C. C.) 140. Such duties imposed upon the vessel are distinguishable from taxes on the cargo, and are not within the constitutional prohibition that no tax or duty shall be laid on articles exported from any state. Bills of lading, on the other hand, since they represent in commercial usage the goods included therein, are treated as themselves the exports, and cannot be taxed. *Fairbank* v. *United States*, 181 U. S. 283. Manifests are memoranda of the cargo required by the collector of the port before clearance is given to the outgoing vessel. U. S. Rev. Sts. §§ 4197–4199. Since they in no way represent the cargo, and since they are taxed according to the tonnage of the vessel cleared, the tax thereon seems to be, like a tonnage duty, a tax on an instrument of commerce rather than a tax on exports. For this reason the present decision seems questionable.

CONSTITUTIONAL LAW — POLICE POWER — POWER OF COURT TO REVIEW LEGISLATIVE ACT. — The defendant below was convicted of selling milk from a cow fed on a by-product of brewing called "still-slop," in violation of a statute which prohibited such sale as against public health. He appealed, contending that in the absence of evidence to show that "still-slop" was unhealthy, prohibition of its use was unconstitutional as violating the Fourteenth Amendment. *Held*, that the conviction will be affirmed. *Sanders* v. *Commonwealth*, 77 S. W. Rep. 358 (Ky.). See NOTES, p. 269.

CONSTITUTIONAL LAW — POLICE POWER — PROTECTION OF PUBLIC TASTE. — A statute gave park commissioners power in their discretion to prohibit the exhibition of advertisements on lands fronting on the public parks, squares, and places of the city of New York. *Semble*, that the statute is unconstitutional as depriving abutting owners of their property without due process of law. *People* v. *Green*, 85 N. Y. App. Div. 400. See NOTES, p. 275.

CONSTITUTIONAL LAW — SEPARATION OF POWERS. — A statute provided that if a sentence imposed against the accused by a trial court was excessive the supreme court might reduce it and render such sentence as it considered warranted. *Held*, that the statute is not unconstitutional as permitting an exercise of the pardoning power by the judiciary. *Palmer* v. *State*, 97 N. W. Rep. 235 (Neb.).

In the earliest cases involving the exercise of the power conferred by such statutes

the courts acted with little or no discussion of the constitutional question involved. See *Fager* v. *State*, 22 Neb. 332; *United States* v. *Wynn*, 11 Fed. Rep. 57. Two late cases, on the other hand, refused to interfere with sentences under similar provisions upon the ground that the pardoning power is an exclusive prerogative of the executive branch of the government. *Barney* v. *State*, 49 Neb. 515; *Fanton* v. *State*, 50 Neb. 351. The present case, however, overrules them, and reasserts the validity of the statute. This conclusion seems to be sound. The granting of a pardon by the executive does not purport to affect the validity of the judicial proceedings under which the accused is held. On the contrary it admits their legality. *Cook* v. *Board, etc., of Middlesex*, 26 N. J. Law 326. But a reduction of the sentence by the appellate court for an abuse of discretion by the trial judge attacks the validity of the sentence itself. The accused may demand it as his legal right. See *Anderson* v. *State*, 26 Neb. 387. It therefore takes effect upon a principle quite different from that on which a pardon is granted.

CONTEMPT — UNFAIR NEWSPAPER PUBLICATION BEFORE SUIT PENDING. — The defendant published a newspaper article tending to prejudice the fair trial of a person who had been accused and arrested but had not yet been committed to the assizes. *Held*, that the defendant may be punished for contempt of court. *Rex* v. *Parke*, 67 J. P. 421 (Eng., K. B.).

In general the publisher of any article which reflects upon the court or the parties in a pending suit and tends to prejudice the public with respect to the merits of the case, is punishable for contempt of court. *Matter of Sturoc*, 48 N. H. 428; *In re Cheltenham, etc., Co.*, L. R. 8 Eq. 580; see *Regina* v. *O'Dogherty*, 5 Cox C. C. 348. But in most jurisdictions the defendant is not deemed guilty of contempt if the publication concerns proceedings which have been terminated. *Storey* v. *People*, 79 Ill. 45. No previous case has been found which has held the defendant guilty where the suit was not yet actually pending. Since, however, the doctrine of the cases is that such publications tend to taint the minds of people who may thereafter be called to act as jurors, and thus to prevent the unprejudiced administration of justice, the decision seems sound.

COPYRIGHTS — LITERARY PROPERTY — COMMON LAW RIGHT AFTER PUBLICATION. — An architect filed plans with the city building department. Afterwards, without his consent, another party used those plans in the construction of a building. *Held*, that the filing of the plans constituted such a publication as to forfeit the architect's exclusive rights. *Wright* v. *Eisle*, 83 N. Y. Supp. 887. See NOTES, p. 266.

DESCENT AND DISTRIBUTION — RELINQUISHMENT OF EXPECTANT ESTATE BY HEIR. — A father made an advancement of real and personal property to each of his three children, in consideration of which two of them gave him a release under seal of all their claim and interest in any property which he then had or might acquire, and as to which he might die intestate. The father died intestate leaving property. *Held*, that the estate descends equally to each of the three children. *Headrick* v. *McDowell*, 45 S. E. Rep. 804 (Va.).

The agreements of release, being just as between the parties, should be enforced if the rules of law will allow it. They cannot take effect as releases at law, for the rights to be released were not at the time in existence. CO. LIT. 265. The courts have however generally given effect to the agreements, by holding them to be binding legal contracts not to bring suit against the estate, *Firestone* v. *Firestone*, 2 Oh. St. 415; or advancements in full barring the heir under the statutes regulating advancements, *Quarles* v. *Quarles*, 4 Mass. 679; or, where a deed is given, by holding the person giving the deed to be estopped, *Kershaw* v. *Kershaw*, 102 Ill. 307; or, if a covenant not to claim be given, by holding that the person making the covenant is barred from later making any claim to the estate, on the theory of avoiding circuity of action, *Trull* v. *Eastman*, 3 Met. (Mass.) 121. The preferable rule seems to be that such releases, though void at law, should be enforced in equity if the intention is clear, consideration is given, and no fraud is involved. *Havens* v. *Thompson*, 26 N. J. Eq. 383. The contrary decision in the principal case seems to have limited unnecessarily a person's power to make such contracts as he thinks are for his benefit. The argument of the court that the property might be left undisposed of if no heir free to take it could be found, overlooks the fact that in that case it would go to the state.

DIVORCE — ALIMONY. — *Held*, that in an action for divorce and alimony, the court, in determining the amount to be awarded, may take into consideration property which the husband had previously transferred in fraud of creditors. *Dougan* v. *Dougan*, 97 N. W. Rep. 122 (Minn.).

The conveyance of property by a husband with intent to avoid payment of alimony is within the prohibition of the ordinary statutes against fraudulent conveyances. *Livermore* v. *Boutelle*, 11 Gray (Mass.) 217. Where, as in the principal case, the conveyance was made in fraud of existing creditors, but without any intention to defraud the wife, the correct rule would seem to be that the conveyance may or may not be set aside by her, according as the jurisdiction is or is not one in which subsequent creditors would be allowed to set it aside. In Minnesota subsequent creditors are not allowed that right. *Fullington* v. *Northwestern, etc., Ass'n*, 48 Minn. 490. It follows that in that state a decree for alimony should give the wife no power to set aside such a conveyance. Furthermore the husband is certainly powerless to force a reconveyance. *Dunaway* v. *Robertson*, 95 Ill. 419. Since neither party has any rights in such property, it would seem that the court, in determining the amount of alimony, should have left out of consideration the property thus transferred.

Dower — Redemption of Mortgaged Land by Executor. — A testator purchased an equity of redemption in land subject to deeds of trust, but did not assume to discharge the incumbrances. Under an order of the court to sell the testator's realty, his executor in one transaction sold the land and paid off the incumbrances. *Held*, that the widow of the deceased is entitled to dower in the land. *Casteel* v. *Potter*, 75 S. W. Rep. 597 (Mo., Sup. Ct.). See Notes, p. 267.

Election of Remedies — Right of Objecting Creditor to Take under Fraudulent Assignment. — A judgment creditor secured a decree that an assignment for the benefit of creditors was fraudulent and void as to him; but finding it impossible to satisfy his judgment, he claimed the right to take under the assignment. *Held*, that he is entitled to take under the assignment. *Matter of Garver*, 176 N. Y. 386.

The court considers that neither the doctrine of election of remedies nor that of *res judicata* operates to bar the creditor's claim. In most jurisdictions, when once a creditor secures the setting aside of the assignment, he is deemed to have made his election and to be barred from taking under the assignment. *Glenn* v. *O'Bryan*, 91 Tenn. 106. In New York, however, the contrary rule is well established. *Sternfeld* v. *Simonson*, 44 Hun (N. Y.) 429; *Mills* v. *Parkhurst*, 126 N. Y. 89. Accepting the New York view, still it is difficult to see how the court can meet the objection of the dissenting judges that the matter is *res judicata*. A final judgment has been previously rendered by a court of competent jurisdiction on the same issue, namely, the validity of the assignment, between the same parties acting in the same capacity. See *Succession of Durnford*, 1 La. An. 92.

Electric Wires — Duty to Insulate against Lightning. — The defendant, an electric lighting company, allowed the insulation on its wires to become worn where they entered the plaintiff's house. A fire started at that place during a thunderstorm and destroyed the house. In a suit by the plaintiff the trial court instructed the jury that the company was under a duty to insulate its wires against lightning. *Held*, that the instruction is erroneous. *Phœnix, etc., Co.* v. *Bennett*, 74 Pac. Rep. 48 (Ariz.).

By the general rule, an action for negligence cannot be maintained where it was improbable that any damage would result from the defendant's act. Accordingly, a failure to guard against an intervention of natural forces which could not have been reasonably foreseen does not create liability, either because there is no negligence in such a failure, or because it is not regarded as the proximate cause of the damage. *Ward* v. *Atlantic, etc., Co.*, 71 N. Y. 81; *Denny* v. *New York Central R. R.*, 13 Gray (Mass.) 481. On the other hand, however violent those forces may be, if past experience has shown them to be probable, they must be guarded against. *Gray* v. *Harris*, 107 Mass. 492. In determining whether any such occurrence is so unusual that it could not have been reasonably foreseen, the meteorologic conditions of the place must be conclusive. The principal case is the only square decision which has been found on the point whether thunderstorms should be anticipated, and it is contrary to two strong *dicta*. See *Jackson* v. *Wisconsin Tel. Co.*, 88 Wis. 243; *Southwestern, etc., Co.* v. *Robinson*, 50 Fed. Rep. 810. Unless climatic conditions in Arizona are very peculiar, it would certainly seem that a thunderstorm which charges a wire with electricity is not such an improbable occurrence that it need not be guarded against.

Eminent Domain — Easement to Flow — Rights of Owner of Fee. — The defendant, a railroad corporation, maintained a pond on the plaintiff's land over which it had obtained an easement by condemnation proceedings to catch and store water for use in operating its engines. The defendant cut and sold the ice which formed on

the pond. The plaintiff claimed a right to use the pond for purposes not incompatible with that for which the land was condemned, and brought action to recover the value of the ice sold. *Held*, that the defendant is entitled to the exclusive use of the pond. *Dillon* v. *Kansas City, etc., R. R. Co.*, 74 Pac. Rep. 251 (Kan.).

The rights of the owner of an easement are determined by the purpose and character of the easement. The owner of land subjected to an easement has a right to use the land for all purposes not inconsistent therewith. Thus the owner of land over which there is a highway is entitled to the timber that grows on the highway. *Adams* v. *Emerson*, 6 Pick. (Mass.) 57. In determining the rights of the owner of the fee the same principles apply whether the easement is owned by a railroad or by the public. *Blake* v. *Rich*, 34 N. H. 282. Likewise, the owner of land subjected to the burden of a mill pond by proceedings under a mill act may use water from the pond for his cattle, for irrigation, or for other purposes, provided he does not thereby appreciably diminish the head of water at the dam. *Paine* v. *Woods*, 108 Mass. 160. While a railroad company may use trees on its right of way in constructing its road, it may not cut them to sell. *Taylor* v. *New York, etc., R. R. Co.*, 38 N. J. Law 28. The weight of authority is clearly against the principal case. See *Kansas Central R. R. Co.* v. *Allen*, 22 Kan. 285.

Evidence — Admissibility of Expert Testimony to Prove Incapacity to Bear Children. — The plaintiff in a deed of trust provided that in the event of his death the defendant should transfer the property covered by the deed absolutely to the plaintiff's wife unless there should be children of their marriage, in which case the defendant should distribute the property between the wife and the children. Subsequently, there being no children, the plaintiff and his wife joined in a bill to have the trust set aside, and medical testimony was offered to prove the wife to be incapable of having issue. *Held*, that the evidence is inadmissible. *Ricards* v. *Safe Deposit, etc., Co.*, 55 Atl. Rep. 384 (Md.).

The point at issue is believed to be without precedent in America. It would seem, however, that the decision is sound. That a trust may be terminated by agreement of the parties in interest is conceded, but where *cestuis* specified in the deed are unborn the uncertainty of expert evidence renders its reception to affect the devolution of property by cutting off the possible rights of such beneficiaries unsafe. Again, the evidence seems incompetent on grounds of public policy. If in such cases a trust or settlement may be defeated by evidence of inability to bear children due to natural causes, it is difficult to see how, should measures be taken to prevent the possibility of procreation, medical testimony showing the fact could be excluded. It is evident, however, that its admission might tend to encourage a resort, by interested parties, to practices which are manifestly subversive of good morals. The English doctrine seems to accord with that of the principal case. See *In re Dawson*, L. R. 39 Ch. D. 155.

Gifts — Inter Vivos — What Constitutes Delivery. — A father, having made a positive declaration of a gift of certain money to his daughter, pointed out to her the various places about his farm where the money was buried. The daughter did not remove the money until after the father's death. *Held*, that there is a valid constructive delivery of the gift. *Waite* v. *Grubbe*, 73 Pac. Rep. 206 (Ore.).

It is generally recognized that delivery is essential to the validity of a parol gift. Constructive delivery is held sufficient under special circumstances, where the nature of the thing itself renders delivery impossible, as is true of a chose in action, or where business custom sanctions constructive delivery, as in case of cattle branded with the donee's brand. *Commonwealth* v. *Crompton*, 137 Pa. St. 138; *Hillebrant* v. *Brewer*, 6 Tex. 45. Inasmuch as the formality of delivery is considered necessary to prevent fraud and imposition, constructive delivery, although sometimes extended further, should be limited to these classes of cases. Money is of such a transferable nature that it seems to be improperly treated by the court as an object of constructive delivery. The decision, however, may conceivably be supported on the ground of actual delivery. Actual delivery may be made without manual delivery, as, for example, where articles are of a bulky character. *Fletcher* v. *Fletcher*, 55 Vt. 325. It is sufficient if the donor gives up, and the donee actually assumes, control of the thing. See *Gammon Theological Seminary* v. *Robbins*, 128 Ind. 85. Whether in the principal case this was done is a doubtful question of fact.

Husband and Wife — Coverture — Right of Wife to Action for Alienation of Husband's Affections. — *Held*, that under a statute giving a married woman living separate from her husband the right to bring suit in her own name to recover damages for injuries done to her person or reputation, a married woman can-

not maintain an action against one who entices away her husband. *Hodge* v. *Wetzler*, 55 Atl. Rep. 49 (N. J., Sup. Ct.).

By this decision the New Jersey court adopts the view held in Wisconsin and Maine, but not accepted in most jurisdictions, that statutes conferring separate rights upon married women should be construed strictly. See 8 HARV. L. REV. 507; 11 *ibid.* 270; 12 *ibid.* 142; 13 *ibid.* 49.

HUSBAND AND WIFE — LIABILITY OF HUSBAND FOR NECESSARIES AFTER SEPARATION. — After notice from the defendant that he had put away his wife for justifible cause, the plaintiff rendered her necessary medical services. *Held*, that the plaintiff may recover compensation from the defendant. *Button* v. *Weaver*, 87 N. Y. App. Div. 224.

It is universally held that a husband is not liable for necessaries furnished a wife who has deserted him without sufficient cause. *Monroe County Board of Supervisors* v. *Budlong*, 51 Barb. (N. Y.) 493. Generally in the United States the same result is reached where the husband justifiably abandons the wife. *Sawyer* v. *Richards*, 65 N. H. 185. The doctrine of these cases appears to be that the wife may lose her right to support by her own wrongful act. See *Billing* v. *Pilcher*, 7 B. Mon. (Ky.) 458. The decision seems to disregard this doctrine and to draw an unwarrantable distinction between the two classes of cases. It may, however, be justified by recent authority in New York and by *dicta* in early English cases. *Hatch* v. *Leonard*, 165 N. Y. 435; see *Robison* v. *Gosnold*, 6 Mod. Rep. 171. But the reasoning in later English cases is against it. See *Wilson* v. *Glossop*, 19 Q. B. D. 379.

INJUNCTION — ENJOINING SOLICITATION OF BREACHES OF CONTRACT. — A competing publisher was soliciting subscribers to the plaintiff's publication to break their contracts of subscription. *Held*, that an injunction against such acts will be issued. *American Law Book Co.* v. *Edward Thompson Co*, 84 N. Y. Supp. 225.

Only one other instance in which equity enjoined a person from soliciting the breach of contracts has been found. See *Nashville, etc., R.* v. *McConnell*, 82 Fed. Rep. 65. Lack of a precise precedent will not, however, prevent the granting of an injunction, if the general principles of equity will warrant its issuance. *Hamilton* v. *Whitridge*, 11 Md. 128. Speaking generally, equity will enjoin an illegal act if its commission will inflict irreparable injury on the complainant. *Erhardt* v. *Boaro*, 113 U. S. 537. It is well settled that the acts complained of by the petitioner in the principal case are illegal. *Rice* v. *Manley*, 66 N. Y. 82. It is clear furthermore that the loss of prestige which would result from the refusal of a large number of customers to abide by their contracts of subscription might easily constitute a permanent injury to the petitioner's business, and a court of equity regards as irreparable an injury which destroys or seriously cripples an established business. *Angier* v. *Webber*, 96 Mass. 211. Since the same necessity which influences courts of equity to grant relief by injunction in other cases exists in the principal case, the granting of the injunction is a proper exercise of the discretionary powers of the court.

INSURANCE — MARINE INSURANCE — DECK CARGO ON INLAND VOYAGE. — The plaintiffs brought action upon a marine insurance policy to recover the loss they had suffered from the destruction by fire of certain bales of cork carried on the deck of a river steamer. The policy was upon "corks, bottles, and other goods" to be carried up the Rhine. *Held*, that the goods are covered by the policy. *Apollinaris Co.* v. *Norddeutsche Ins. Co.*, 20 T. L. R. 79 (Eng., K. B.).

It is a general rule that goods carried on deck, unless specifically mentioned, are not covered by a policy on "cargo, property, or goods." *Taunton Copper Co.* v. *Merchants' Insurance Co.*, 22 Pick. (Mass.) 108. This rule, however, does not apply to goods insured by name which from their nature are usually stowed on deck. Nor does it apply where there is a clear and established usage to carry cargoes like the one insured upon deck, and where it is deemed convenient and prudent to do so. In these cases the underwriter assumes without express provision all the damages and advantages of such usages. *Hazleton* v. *Manhattan Ins. Co.*, 12 Fed. Rep. 159. The principal case, therefore, in holding that the rule does not apply to an inland voyage by river plainly contemplated by the policy, on which voyage it is the practice and usage to carry cargoes on deck, would seem to be sound.

MINES AND MINERALS — NATURAL GAS — REASONABLE USE. — The defendant desired to injure the plaintiff's gas field, and was accomplishing that purpose by maintaining on neighboring gas land a lampblack factory which wasted enormous quantities of gas without producing a substantial quantity of lampblack. *Held*, that the

running of the factory will be enjoined. *Louisville Gas Co.* v. *Kentucky Heating Co.*, 77 S. W. Rep. 368 (Ky.).

This case is apparently the first distinctly limiting each surface owner to a reasonable use of the natural gas from a common reservoir. Since damage to a gas field does in fact greatly damage the surface owners, the law should not refuse relief without strong reasons. The reason most urged is that the law as to percolating waters, according to which no surface owner can complain if his neighbor's well draws away the water, furnishes an analogy which should control the law as to gas. *Jones* v. *Forest Oil Co.*, 194 Pa. St. 379. The difficulties, however, which have prevented the protection of rights in percolating waters do not exist as to gas, since the latter, unlike water, lies so far below the surface, that rights in it can be protected without interference with ordinary use of the land. Furthermore the cause of injury can ordinarily be more satisfactorily determined in the case of gas than in the case of percolating water. Accordingly, rights in gas should be recognized. *Manufacturers Gas Co.* v. *Indiana Natural Gas Co.*, 155 Ind. 461; *contra*, *Hague* v. *Wheeler*, 157 Pa. St. 324. The rule of a reasonable use adopted by the court is well adapted to protect the common reservoir.

Municipal Corporations — Public Streets — Private Rights Acquired by Equitable Estoppel. — A village ordinance apparently gave a street railway company the right to build a viaduct 25 feet in width over a portion of a street. The ordinance in fact gave a way only 20 feet wide. The village, by its officers, supervised the construction of the viaduct. Upon demand by the village that the encroachment be removed, the company applied for an injunction restraining the village from interfering with the viaduct. *Held*, that the injunction will be granted. *Village of Winnetka* v. *Chicago, etc., Ry. Co.*, 68 N. E. Rep. 407 (Ill.). See Notes, p. 273.

Parol Evidence Rule — Its Nature and Scope. — In an action on a written contract, the defendant, without objection, introduced evidence of a verbal agreement, varying the terms of the writing. The court instructed the jury to disregard this evidence. *Held*, that the parol evidence rule is a rule of substantive law, and that the instruction is therefore proper. *Pitcairn* v. *Philip Hiss Co.*, 125 Fed. Rep. 110 (C. C. A., Third Circ.).

In an action on a promissory note, the defendant, without objection, introduced parol evidence tending to vary his liability as it appeared on the face of the note. *Held*, that the evidence, having been admitted without objection, is in the record for all purposes. *Union Bank of Brooklyn* v. *Chase*, 84 N. Y. Supp. 550. See Notes, p. 271.

Pleading — Ejectment — Averment of Plaintiff's Interest. — The only averment of title in an action of ejectment was an allegation of a relationship of landlord and tenant existing between the plaintiff and the defendant. After a verdict for the plaintiff the defendant moved in arrest of judgment that the declaration was insufficient. *Held*, that the declaration alleges a sufficient title in the plaintiff. *Ayotte* v. *Johnson*, 56 Atl. Rep. 110 (R. I.).

The principal case appears squarely to raise the question whether a declaration merely setting forth the lease is a sufficient averment of present interest in the premises to permit a landlord to maintain an action of ejectment. Such a declaration sufficiently alleges title in the lessor at the time of leasing, since the lessee is estopped to deny its validity at that time. *Rector* v. *Gibbon*, 111 U. S. 276. Hence it would appear to set forth a *prima facie* case of present title, since a state of things once shown to exist is presumed to continue. *Rowland* v. *Updike*, 28 N. J. Law 101. It follows that a tenant wishing to defend on the ground of a subsequent termination of his lessor's interest must allege this as new matter by an affirmative plea. Accordingly the decision appears sound on principle, although no authority directly in point has been found. *Cf.* Williston's Stephen on Pleading, p. 363. The decision is even more clearly correct if the averments in the declaration are to be construed as allegations of a present relationship of landlord and tenant.

Railroads — Right to Demurrage. — The plaintiff allowed a car to remain unloaded for an unreasonable length of time after notification of its arrival. The defendant now claimed a lien on the goods for demurrage in accordance with its regulations. *Held*, that the lien exists. *Schumacher* v. *Chicago, etc., R. R. Co.*, 108 Ill. App. 520.

The Illinois courts have heretofore held in accordance with the Nebraska courts that the right to demurrage attached only to carriers by water. *Chicago, etc., R. R. Co.*

v. *Jenkins*, 103 Ill. 588; *Burlington, etc., R. R. Co.* v. *Chicago Lumber Co.*, 15 Neb. 390. The principal case, therefore, is of interest in that it brings Illinois into line with the weight of authority. *Kentucky Wagon Co.* v. *Ohio, etc., R. R. Co.*, 32 S. W. Rep. 595 (Ky.). The decision appears to be sound on principle also, since there seems to be no argument in favor of allowing demurrage to carriers by water which does not apply with equal or greater force to carriers by land.

RECEIVERS — LIABILITY TO SUIT. — In an action against certain associations in the hands of receivers, the plaintiffs failed to allege that permission to sue the receivers had been obtained from the court appointing them. *Held*, that this is an essential allegation. *Manker* v. *Phœnix, etc., Ass'n*, 96 N. W. Rep. 982 (Ia.).

Heretofore the Iowa courts have held that one might maintain an action in any court against a receiver appointed by another court without first obtaining the permission of the latter, although the appointing court would have authority under these circumstances to interfere by injunction at any time for the protection of its receiver. *Allen* v. *Central R. R. Co.*, 42 Ia. 683. The principal case is of interest in that it overrules these earlier decisions and brings the Iowa law into line with the weight of authority. *Porter* v. *Sabin*, 149 U. S. 473. It is also another illustration of the extent to which the courts will go in order to protect receivers. See 17 HARV. L. REV. 196.

SURETYSHIP — SURETY'S RIGHT OF SUBROGATION. — A surety company which was surety for one of several joint tort-feasors paid a judgment recovered in tort against them. *Held*, that the surety is entitled to be subrogated to the judgment creditor's rights. *Kolb* v. *National Surety Company*, 176 N. Y. 233. See NOTES, p. 276.

TAXATION — PURCHASE OF NON-TAXABLE BONDS TO AVOID TAXATION. — A statute provided that personal property should be listed for taxation with reference to the quantity held on a certain day. The defendant bank, for the purpose of avoiding taxation, purchased United States bonds immediately before, and sold them immediately after, the date fixed by the statute. *Held*, that the defendant may be assessed with the money invested in the bonds. *In re People's Bank of Vermont, Ill.*, 67 N. E. Rep. 777 (Ill.).

Any person has a legal right to purchase bonds, even though his purpose be to avoid taxation. *Stilwell* v. *Corwin*, 55 Ind. 433. Equity will not enjoin the collection of a tax levied upon money so invested. *Mitchell* v. *Board of Commissioners of Leavenworth Co., etc.*, 91 U. S. 206. What authority has been found supports the principal case. *Holly Springs, etc., Co.* v. *Supervisors of Marshall Co.*, 52 Miss. 281. On principle, however, the result seems indefensible. Equity may, indeed, well refuse to enjoin the collection of the tax because the defendant is not deserving of its assistance in his sharp practice. But at law, since the defendant had a legal right to purchase the bonds, there was no fraud of which a court could take cognizance. The result is that either the defendant has been assessed with property which on taxing day was another's, or the tax has been levied as a penalty, neither of which is provided for by the statute. It is, therefore, for the legislature, rather than for the courts, so to extend the law as to prevent similar transactions. A provision against the evasion of taxation in this manner appears in an Ohio statute. See *Shotwell* v. *Moore*, 129 U. S. 590.

TORTS — LIABILITY OF NEGLIGENT MAKER OR VENDOR OF CHATTEL. — The defendant company sold a defectively constructed land-roller, which was resold to the plaintiff. Owing to the defect, the plaintiff was injured. *Held*, that the defendant is not liable. *Kuelling* v. *Roderick Lean Mfg. Co.*, 84 N. Y. Supp. 622.

The defendant sold diseased hogs. These were resold to the plaintiff, who placed them with his own. The plaintiff's hogs died of the disease. *Held*, that the defendant is liable. *Skinn* v. *Reutter*, 97 N. W. Rep. 152 (Mich.). See NOTES, p. 274.

TRADE UNIONS — JUSTIFICATION FOR INJURY INTENTIONALLY DONE TO EMPLOYER'S BUSINESS. — The plaintiff having refused to sign a contract with its employees not to continue the "piece work system" in its factory, the defendant union caused a strike, and stationed men near the factory who persuaded many of the non-union men still working for the plaintiff to leave. *Held*, that an injunction restraining the defendant from interfering with the plaintiff's business will not be vacated, on the ground that the object of the interference was not to increase the employee's wages, but to restrict the plaintiff's freedom of carrying on his business. *Davis Machine Co.* v. *Robinson*, 41 N. Y. Misc. 329.

The intentional infliction of injury by one person on the business of another should be considered *prima facie* actionable unless there is justification. The struggle for existence called competition in trade is a justification; and so also should be the struggle for existence between employers and employees. See 15 HARV. L. REV. 482. In the principal case a distinction was drawn between competition as to the price of labor, which the court intimates would justify the injury done, and competition as to the conditions of labor, which they say does not justify the injury. But success by the employee in competition as to the conditions under which his labor shall be performed may be just as important to the employee, and no more harmful to the employer, than success in the competition as to the price of labor. The decision of the court overlooks the consideration that the right of the employee to improve the conditions of labor is as great as that of the employer to dictate how his business shall be conducted.

WATERS AND WATERCOURSES — EROSION — RIGHT OF RIPARIAN OWNER TO RECLAIM LAND. — The defendant, an owner of land which had been gradually encroached upon by a river, built a wall where his bank originally stood. This flooded a mill owned by the plaintiff, who brought suit to compel removal. *Held*, that the wall is an unlawful obstruction, and must be removed. *Holcomb* v. *Blair*, 76 S.W. Rep. 843 (Ky.).

Only two other decisions have been found concerning the right of a riparian owner to reclaim land lost through erosion. One of these holds that he may build out to his original line, even if it injures the other owners. *Gulf, Col. etc., R. Co.* v. *Clark*, 101 Fed. Rep. 678. This liberal interpretation of his rights corresponds to some extent to those decisions which allow a riparian owner to guard against future erosion even at the expense of other proprietors. *Shelbyville, etc., Turnpike Co.* v. *Green*, 99 Ind. 205. The other case, decided in Scotland, accords with the principal case in denying any right to reclaim eroded land. *Aberdeen* v. *Menzies*, cited in *Withers* v. *Purchase*, 60 L. T. R. 819, 821. This would probably be the law also in those jurisdictions which do not allow protection even against future erosion if it will flood the land of others. *Gerrish* v. *Clough*, 48 N. H. 9. Logically the principal case seems unassailable. Restoring the old bank, and so changing the middle line of the stream, deprives the opposite owner, by means of an artificial erection, of property made his by accretion. Since title by accretion is perfect, such an act is equally unlawful whether the channel has recently changed or not. *Menzies* v. *Breadalbane*, 3 Bli. N. S. 414.

WITNESSES — RELIGIOUS BELIEF AS AFFECTING CREDIBILITY. — A statute provided that no witness should be deemed incompetent on account of his religious belief. A witness having testified that he had no fixed belief in a Supreme Being or in a future state of rewards and penalties, the court charged that his statements might be considered as affecting his credibility. *Held*, that the charge is erroneous. *Brink* v. *Stratton*, 176 N. Y. 150.

The imprecation of divine vengeance alone was originally thought to give the oath its binding effect upon the conscience, from which it followed logically enough that want of belief in the Supreme Being rendered a witness incompetent to testify. *Curtiss* v. *Strong*, 4 Day (Conn.) 51. With the diminishing force of the reason of the rule, however, the rule itself has been modified, until by statute in a large number of states there are to-day no religious qualifications of competency, although in several of them, by statute or judicial decision, want of faith may still be shown to affect credibility. *State* v. *Elliot*, 45 Ia. 486; *Hunscom* v. *Hunscom*, 15 Mass. 184. Since the effect of an oath on an "unbeliever," while not necessarily weaker than that on a "believer," must nevertheless be different from it, it would seem to follow that unbelief may properly be shown for that purpose. The principal case is believed to be the first actual decision to reach an opposite conclusion. In thus annihilating the old common law distinction, it in effect overrules the previously accepted doctrine in New York. *Stanbro* v. *Hopkins*, 28 Barb. (N. Y.) 265; see *People* v. *M'Garren*, 17 Wend. (N. Y.) 460.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

FOREIGN VOLUNTARY ASSIGNMENTS. — This subject, in so far as it relates to the conflict of laws between the states of the Union, is treated by a recent writer. *Foreign Voluntary Assignments for the Benefit of Creditors*, by Edson R. Sunderland, 2 Mich. L. Rev. 112, 180 (Nov. & Dec., 1903). The author states the general rule to be that a voluntary general assignment valid where made will be held valid as to the assignor's property everywhere. But where the thing assigned is land the rule seems clear that the validity of the foreign assignment is determined by the laws of the *situs*. *Gardner* v. *Commercial, etc., Bank*, 95 Ill. 298. Where the *res* is personalty the cases generally lay down the rule as it is stated by the author. Mr. Sunderland's language would seem to imply that he considers this rule to be related to the general doctrine that the validity of a contract depends on the *lex loci contractus*. This is true where the *res* is a chose in action, for in such a case the assignment is merely the creation of a power of attorney, and its effect is governed by the law under which the act is done. *Egbert* v. *Baker*, 58 Conn. 319. But the transfer of chattels is of course an entirely different matter. The binding force of a contract is imposed by the law of the place where the promise is given. But the transfer of title to chattels or realty can only be effected by the law having actual jurisdiction over them. *Cammell* v. *Sewell*, 5 H. & N. 728. Many of the cases talk of "comity" and of the rule that "the *situs* of personalty is the domicil of the owner." But to invoke such a fiction here seems unnecessary and misleading. That an assignment, valid where made, does, in general, pass title to chattels everywhere, results from the fact that, in general, any transaction which amounts to a transfer under the law of one jurisdiction is equally efficacious under the law of any other jurisdiction; such a transfer depending everywhere mainly on the intention of the parties and little on forms.

It is only, then, by reason of the various statutes which in some jurisdictions invalidate assignments giving preferences, or require the filing of bonds, inventories, etc., to perfect an assignment, that the question of the validity of a foreign assignment of chattels not conforming to the law of the *situs* is raised; and then it would seem to become entirely a matter of interpretation of the statute, though it is in fact very often treated as if it were a question of conflicting considerations of comity and of policy. As Mr. Sunderland points out, the problem has been answered in very different ways. Some decisions under the statutes hold the assignment wholly void; while by many courts it has been held valid as against creditors domiciled in the state of the assignment, by other courts as against all but domestic creditors, and by still others as against all persons. The author seems to approve of the decisions which make the statutes applicable only to domestic assignments; and, at all events, he would hold creditors domiciled in the state of the assignment bound thereby. There is, however, certainly strong reason to object to any distinctions based on citizenship. The intention to so discriminate will be hard to find in the statutes; and a statute which does expressly so discriminate offends against the spirit of comity and liberality which ought to prevail between civilized nations and particularly between states of the American Union. It is, of course, urged that an opposite rule would compel the domestic creditor to go to the foreign state for his remedy. But his contract was not made in reliance on the property within the state, and in justice he has no better claim to it than has a foreign creditor. Moreover, it would seem that a statute, making distinctions against citizens of another state, would now be held unconstitutional in the United States. *Blake*

v. *McClung*, 172 U. S. 239, 176 U. S. 59; *Belfast Savings Bank* v. *Stowe*, 92 Fed. Rep 100.

The question, as to assignments within the United States, loses much of its practical importance under the national bankruptcy act; for an assignment for the benefit of creditors is an act of bankruptcy and affords a basis for proceedings in bankruptcy, which involve all the bankrupt's property throughout the country, and nullify an assignment of less than four months' standing.

Liability to Users of Electricity of one Negligently Breaking the Conducting Wires. — This, broadly, is the subject of an article criticising a recent case. *Liability for Breaking Electric Wires*, Anon., 10 Case & Com. 63 (Nov., 1903). In the case in question a building contractor undermined a sidewalk in violation of a local ordinance, and negligently broke wires in an underground conduit. These wires belonged to a company that was under a contract with a publishing company to supply electricity for power and light, subject, however, to accidental interruptions. The Supreme Court of Georgia denied the publishing company recovery in tort against the contractor, on the ground that its damage resulted only from the non-performance of a contract by a third party, and that the only damage proximately caused by the defendant was the injury to the property of the electric company. *Byrd* v. *English*, 117 Ga. 191. This reasoning the above article shows to be fallacious, since the plaintiff's rights did not arise from a breach of contract, because there was no breach, and since the plaintiff's damage was a direct and immediate result of the defendant's act. The writer argues that just as the proprietor of a store may have an action when access to his place of business is unlawfully cut off; or a mill owner, when his easement or license of a water-channel is wrongfully interfered with on the servient land by a third party, so in the principal case an action should lie for a direct interruption of the plaintiff's lawful business by the defendant's tortious act, without regard to the ownership of the immediate property injured.

This article, as most cases on the subject — to the confusion of lawyers and possibly of some courts — does not expressly distinguish between the question of legal cause and the question of the existence of a duty. In the case discussed the plaintiff's damage was unquestionably the direct and proximate result of the defendant's conduct. The exact point at issue is whether the defendant owed a duty of care not only to the owner of the wire, but also to all persons using the current. To determine when a duty exists is a problem frequently as difficult as it is important, and in each case it would seem to be a mixed question of law and of fact. The cases of easements and access to property, relied upon by the writer, all involve recognized property rights, and so are not helpful. A broader principle is involved here: whether as a general rule a defendant who admittedly has a legal duty of care to one party, has not also a similar duty to any other person or class of persons whom he knows, or, as an average reasonable man, should know, will almost inevitably suffer palpable damage as a direct result of the act which constituted the breach of duty to the first party. Such a rule would give a desirable result in the principal case, is in accordance with the conclusion of the article, and is believed to be wise, and in line with the weight of authority. A case closely in point is where a fire in the plaintiff's buildings would very probably have been extinguished by a volunteer fire company from a neighboring town. The defendant railroad was held liable for the loss of the buildings caused by its negligence in running over and cutting the hose which had been laid across its tracks. *Metallic Compression Casting Co.* v. *Fitchburg R. Co.*, 109 Mass. 277. See *Mott* v. *Hudson River R. Co.*, 8 Bosw. 345, 1 Robt. (N. Y.) 585. *Cf. Kahl* v. *Love*, 37 N. J. Law 5. This principle also appears where the defendant by an act constituting a breach of duty to one party makes more difficult the performance of a contract binding on the plaintiff. *Cue* v. *Breeland*, 78 Miss. 864. Compare, however, the following cases where the facts did not meet the exact requirements of the above rule and recovery was denied.

Dale v. *Grant*, 34 N. J. Law 142; *Anthony* v. *Slaid*, 52 Mass. 290. This principle would seem to be helpful also where the defendant's duty, if any, to the plaintiff depends upon the defendant's performance or non-performance of a contract with a third party. *Pittsfield Cottonwear Mfg. Co.* v. *Pittsfield Shoe Co.*, 71 N. H. 522. In numerous cases where property was damaged by fire, the owner was denied recovery in tort against the water company for failure to maintain in its pipes the pressure required by contract with the municipality. *Boston Safe-Deposit and Trust Co.* v. *Salem Water Co.*, 94 Fed. Rep. 238. This view seems sound, since the defendant could not have foreseen this damage as the almost inevitable result of his breach of contract.

THE HISTORY AND THEORY OF THE LAW OF DEFAMATION. — A scholarly and interesting treatise on this subject by Mr. Van Vechten Veeder is begun in 3 Columbia L. Rev. 546 (Dec. 1903). In early times reputation was amply protected by the seignorial and ecclesiastical courts; but with the decay of the former and the discontent with the procedure and remedies of the latter, the writer shows that the growing jurisdiction of the king's courts came to be extended to defamation. Sitting in the "starred chamber," the king's council also exercised a jurisdiction, limited to the aristocracy, over the statutory offense known as De Scandalis Magnatum, which was directed at first chiefly against sedition and turbulence, but which by the time of Elizabeth extended to non-political defamation. It was at this time also, says the writer, that the king's courts acquired a considerable bulk of litigation in defamation, and formulated the rules which, though then applied alike to written and oral words, came to be applied exclusively to oral defamation. These rules, really in the form of exceptions to unbridled license of speech, depended either on the nature or substance of the imputation, for example, a charge of crime; or on the consequences of the imputation, that is, special damage. The invention of printing, with its consequent spread of reading and writing, brought new dangers to the absolute monarchy; censorship of the press became part of the royal prerogative. The Star Chamber undertook jurisdiction over this alarming form of scandal. Unfettered by rules, it boldly borrowed from the Roman criminal law, but with important modifications and additions of its own, particularly the fundamental principle that libel is punishable as a crime because it tends to a breach of the peace. After the abolition of the Star Chamber the power of censorship steadily waned, and there grew up in the common law, to restrain non-political, non-criminal libel, the civil doctrine of libel, "that although words 'spoken once' would not be actionable, 'yet they being writ and published' became actionable." The writer examines the reasons usually advanced for the common law distinctions which in time came to be established between libel and slander, and comes to the sound conclusion that "an actionable test may be rationally based upon the character of the publication, perhaps upon the motive with which it was published, but not upon its form."

THE NORTHERN SECURITIES CASE. — Professor Langdell's attack on the Merger decision in 16 HARV. L. REV. 539 has elicited a spirited answer from ex-Governor Chamberlain of South Carolina. *The Northern Securities Case; a Reply to Professor Langdell*, by Daniel H. Chamberlain, 13 Yale L. J. 57. The author is no less outspoken in his approval of the decision than was the article which he attacks in its denunciation. Far from being a thoroughly "iniquitous decree," he pronounces it "a beacon marking a great victory in the struggle of justice" and "absolutely dictated and compelled" by the three previous decisions of the Supreme Court, relied on by the Circuit Court of Appeals, viz., *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *U. S.* v. *Joint Traffic Association*, 171 U. S. 505; and *Addystone Pipe and Steel Co.* v. *U. S.*, 175 U. S. 211.

Mr. Chamberlain sees no bearing in the position taken by Professor Langdell that the Sherman Act is "a criminal statute, pure and simple," which does not make the forbidden acts civil torts, since Congress expressly gave the court jurisdiction in equity to restrain such acts; and the power of Congress to do this is unquestioned. He contends that the statute does apply in terms to railway companies, whether or not it was so intended; and at all events considers that question to have been finally settled in *United States v. Trans-Missouri Freight Association*. The proposition that the carriage of persons and goods is not "trade or commerce" within § 2 of the Act, he regards as too preposterous for comment. And, finally, to the argument that there can be no conspiracy where "only one person" is concerned, he answers that there were three distinct corporations which were formal defendants on the record as well as real defendants in the untechnical sense.

A DANGEROUS TENDENCY. *Wm. A. Glasgow.* A protest against an alleged legislative tendency toward paternalism. 37 Am. L. Rev. 845.

ALASKA TRIBUNAL AND INTERNATIONAL LAW. *Thomas Hodgins.* 23 Can. L. T. 435.

ATTITUDE OF THE BRITISH GOVERNMENT TOWARDS LEGAL CONFERENCES. *G. F. Phillimore.* 29 Law Mag. & Rev. 1.

BONUS UNDER THE NEW LAND ACTS, THE. *Anon.* 37 Irish L. T. 487.

CAN A MARRIED WOMAN ACQUIRE TITLE TO LAND BY DISSEIZIN. *Joseph H. Blair.* 57 Central L. J. 485.

COMMENTS UPON SOME RECENT NEW JERSEY CASES ON CORPORATE CONTRACTS IN RESTRAINT OF TRADE. *Norman Grey.* 42 Am. L. Reg. 672.

COMMERCIAL LAW AND MODERN COMMERCIAL COMBINATIONS. Part of the report of the Committee of the American Bar Association. 37 Am. L. Rev. 828.

CONCERNING A DISMEMBERMENT OF THE WELL KNOWN AND TIME-HONORED TITLES OF THE LAW. *Anon.* A criticism of the system of classification used in some digests and cyclopedias. 11 Am. Lawyer 491.

CONTEMPT OF COURT. *Anon.* Discussing the power of a court of appeal to punish for an act committed during the trial of a case, and advocating legislation in Australia. 35 Aust. L. T. 75.

CONTINGENT FEES. *Robert H. Patton.* Discussing contracts for contingent fees in damage cases and the rights of an attorney thereunder. 36 Chic. L. News 127.

DEVELOPMENT OF EQUITY. *Eugene B. Grey.* 18 Chic. L. J. 641, 655.

DISCOVERY AND PRODUCTION. *Robb McKay.* Contrasting the law in England and Ontario. 39 Can. L. J. 762.

DUE PROCESS OF LAW. *Alton B. Parker.* 37 Am. L. Rev. 801.

EFFECT OF THE IMITATIVE INSTINCT OF THE COMMON LAW. *Wm. M. Blatt.* Pointing out some absurdities resulting from the doctrine of *stare decisis.* 37 Am. L. Rev. 892.

ELECTION OF FEDERAL JUDGES. *Frederick Bausman.* A reply to a previous article which advocated popular election. 37 Am. L. Rev. 886.

EQUITABLE LIABILITY OF STOCKHOLDERS. *George B. Barrows.* 13 Yale L. J. 66.

EXPANSION OF THE COMMON LAW. *Sir Frederick Pollock.* One of a series of lectures delivered in this country. 3 Columbia L. Rev. 505.

FAILURE OF CONSIDERATION OR FAILURE OF PERFORMANCE. *H. T.* A plea for discrimination in the use of the terms. 7 Law Notes (N. Y.) 164.

FEDERAL INCORPORATION FOR COMPANIES ENGAGED IN INTERSTATE COMMERCE. *Henry W. Palmer.* 27 Natl. Corp. Rep. 376.

FEUDAL TENURES IN WESTERN INDIA. *J. A. Saldanha.* 5 Bombay L. Rep. 188.

FOREIGN VOLUNTARY ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. Part II. *Edson R. Sunderland.* 2 Mich. L. Rev. 180. See *supra.*

HINDU AND MOHAMMEDAN RELIGIOUS ENDOWMENTS. *Anon.* 13 Madras L. J. 230.

HINDU LAW IN 1902. *Anon.* Résumé of decisions. 5 Bombay L. Rep. 179.

HOMICIDE IN SELF-DEFENSE. *Jos. H. Beale, Jr.* 3 Columbia L. Rev. 526.

INALIENABLE RIGHTS. THE ILLEGALITY OF COLLECTIVE BARGAINING. *Jonathan Ross.* Discussing the inalienability of the right to life, liberty, and the pursuit of happiness. 15 Protectionist 1109.

JUDICIAL SALARIES LAW IN PENNSYLVANIA. *Luther E. Hewitt.* 42 Am. L. Reg. 653.

LAW OF COMPENSATION FOR IMPROVEMENTS EFFECTED BY PERSONS IN POSSESSION OF LAND IN AUSTRALIA. *Anon.* 13 Madras L. J. 223.

LAW OF REASON, THE. *Sir Frederick Pollock.* One of a series of lectures delivered in this country. 2 Mich. L. Rev. 159.
LAW RELATING TO ARBITRATION. *S. N. R.* Discussing duties and powers of arbitrators. 8 Calcutta W. N. 19.
LAWS AND LAW MAKING. *Henry Hilton Brown.* 29 Law Mag. & Rev. 8.
LAW'S DELAY, THE. *John F. Baker.* Detailed suggestions to the commissioners appointed by the Governor of New York to investigate the delays and expenses in the administration of justice. 65 Albany L. J. 372.
LEGAL ASPECTS OF THE PANAMA SITUATION. *Edwin Maxcy.* 13 Yale L. J. 85.
LIABILITY FOR BREAKING ELECTRIC WIRES. *Anon.* 10 Case & Com. 63. See *supra.*
LIABILITY OF TRUST COMPANIES ACTING AS TRANSFER AGENTS. *Charles A. Greane.* 10 Case & Com. 73.
MENTAL ANGUISH DOCTRINE IN TELEGRAPH CASES. *Francis Raymond Stark.* 7 Law Notes (N. Y.) 169.
NATURAL BORN CITIZEN. *Alexander P. Morse.* Discussing the eligibility for the office of President. 3 Wash. L. Rep. 823.
NEGOTIABLE AND NON-NEGOTIABLE PAPER. *Percy R. Wilson.* 11 L. Stud. Helper 369.
NEGOTIABLE INSTRUMENTS ACT IN THE MICHIGAN LEGISLATURE. *George W. Bates.* Advocating adoption of the law. 37 Am. L. Rev. 873.
NONSUITS, OLD AND NEW. *Theodore F. Demarest.* Discussing New York decisions. 65 Albany L. J. 363.
NORTHERN SECURITIES CASE; A REPLY TO PROFESSOR LANGDELL. *Daniel H. Chamberlain.* 13 Yale L. J. 57. See *supra.*
POWER OF THE STATE BOARD OF HEALTH UNDER THE MISSOURI CONSTITUTION TO REVOKE A PHYSICIAN'S LICENSE. *Edw. J. White.* 57 Central L. J. 423.
RATIFICATION IN THE LAW OF AGENCY. *Arthur Gwinn.* 57 Central L. J. 463.
REASONABLE RATES. *Alton D. Adams.* Discussing the historical development of the subject in the Supreme Court. 12 Jour. of Pol. Econ. 79.
REFORM IN MARITIME LAW. *James G. Whiteley.* Advocating the adoption of the proposed international code. 37 Am. L. Rev. 863.
RIGHTS OF PRIVACY. *John A. Montgomery.* 36 Chic. L. News 126.
SOME DECISIONS UNDER THE COMPANIES ACTS (1062–1900). *N. W. Sibley.* 29 Law Mag. & Rev. 69.
SPECIFIC PERFORMANCE. *W. Donaldson Rawlins.* A chatty outline of the growth and scope of the doctrine. 29 Law Mag. & Rev. 37.
STATUS OF AN INNOCENT CONVICT. *C. H. P.* 7 Law Notes (N. Y.) 166.
STATUTORY RESTRAINTS UPON THE MARRIAGE OF DIVORCED PERSONS. *H. J. Whitmore.* 57 Central L. J. 444.
TAXATION OF STOCK EXCHANGE SEATS. *P. H.* 7 Law Notes (N. Y.) 165.
WHAT CONSTITUTES A "CONDITION OF PEONAGE." *Anon.* 57 Central L. J. 441.
WHETHER THE GIVING OF TRADING STAMPS IS SUBJECT TO PROHIBITIVE LEGISLATION. *Anon.* 57 Central L. J. 421.
WORKING OF THE REGISTRATION OF WILLS ACTS IN IRELAND, THE. *Richard J. Kelly.* 29 Law Mag. & Rev. 25.

II. BOOK REVIEWS.

YEAR BOOKS OF EDWARD II. Vol. I. Edited for the Selden Society by F. W. Maitland. Being Volume XVII, for the year 1903. London: Bernard Quaritch. 1903. pp. xciv, 258. 8vo.

It is hard to speak with due moderation of such a book as this. It is so full of learning, so interesting in what it contains, and above all so full of hope and promise for the future, that one's first feeling is merely one of gratitude to the great scholar from whose brave patience and perseverance it has resulted.

For two centuries and a half the year books were a graphic record of the proceedings of the king's courts. Not only the progress of the law, but in a great degree the progress of national life, must be traced in their pages. In them the lawyer finds the history of his law, the historian finds the most authentic source of knowledge of the life of the times, the economist gets his data, and the student of literature finds dramas of real life told with admirable art. Yet of this long series of priceless documents only about half has ever been put into print; and

the published portion is so ill edited as often to be unusable. Of gaps in the published years the most serious is the hiatus during the whole reign of Richard II. — a transition period in law as in other aspects of English life. This hiatus there seems no present likelihood of filling. The volumes of the Rolls Series are gradually working through the unpublished years of Edward III., but it may be another generation before they get far into the next reign. Of the part already published the most corrupt text is undoubtedly that of Edward II.; and this is the text the Selden Society is now beginning to correct for us.

An impatient American finds it hard to acquiesce in the deliberate elegance with which the Master of the Rolls and the Selden Society are proceeding in their task. "What profit me," he asks, "wide margins and learned notes, if I must lay aside my books before I can learn of the development of uses in the last decades of the fourteenth century; and if my learned disputation with Professor Blank about the true meaning of that passage in Maynard cannot be solved by the true text before it is too late for me to enjoy my certain triumph? Better have a good accurate translation from the best manuscript, printed like an ordinary book of reports, and leave the antiquarian study of the text for the leisure of future generations of scholars, and editions de luxe for those who buy their books to look at, not to read."

But though we may long for the speedy publication of a corrected text of the entire series of years, no one can fail to be glad that Professor Maitland has done just the work that appears here. The text has been corrected by comparison of manuscripts; this corrected text has been compared with the rolls, and a luminous translation has been added. But this is not all. We have learned to look to Professor Maitland's introductions for pleasure and profit; and we are not disappointed in this case.

The Introduction begins with a dissertation "of the Year Books in general," in which the editor finally disposes of Plowden's statement that the books were the product of an official system of reporting. It is here conclusively shown that the books were unofficial reports; and "we may strongly suspect that what was wanted was instruction, and that these books were made by learners for learners, by apprentices for apprentices." "As early as 1285 an ever memorable step was taken. Some one was endeavoring to report in the vernacular — that is, in French — the oral debates that he heard in court. In 1293 a fairly continuous stream began to flow. This surely is a memorable event. When duly considered it appears as one of the great events in English history. To-day men are reporting at Edinburgh and Dublin, at Boston and San Francisco, at Quebec and Sydney and Cape Town, at Calcutta and Madras. Their pedigree is unbroken and indisputable. It goes back to some nameless lawyers at Westminster to whom a happy thought had come."

The second part of the Introduction is a careful examination and comparison of certain cases from the text of Maynard with the corrected text and the roll. The errors which are pointed out in the old printed text are startling enough, but we all knew that the text could not be depended upon. Our only surprise is to learn that anything in print could have been quite so inaccurate.

The third part of the Introduction consists in what the editor modestly calls "a few remarks" on the language of the Year Books, which prove to be a learned and elaborate grammar of the Norman-French dialect of the Year-Books. Those who have groped without guide through the barbarous jargon of the later books will benefit by this.

The rest of the Introduction is taken up with a discussion of the manuscripts and of the expansions. A legal calendar follows for the two years that are covered.

When we come to the cases themselves, we are glad to find how much more modern, as well as more human, the law seems in its English dress.

Most of the cases are, to be sure, concerned with the obsolete land law of the time; and very few important cases have been added to Maynard's collection. We get from the rolls, however, several interesting bits of information.

In 1 Ed. II. 6 is an action of dower, in which the demandant eventually failed because she was proved to be a professed nun. The plea first offered

called on the demandant to show where the husband died; and the answer was, he died at Ypota on the sea of Greece. The roll adds new interest to the case when we learn that the husband was Sir John Mandeville; and though the date would seem to prevent our ascribing to him the work that bears his name, the roll must at least require a reconsideration of the disputed question of the authorship of the travels.

The roll in *Fisher* v. *Newgate* (2 Ed. II. 37) brings out an interesting point for which there was no such early authority. The action is debt on a bond, and the plaintiff is given his debt, with damages taxed by the court. The roll then adds, "and be it known that the said writing is redelivered to Richard uncancelled because other debtors are comprised in the same."

There is only one thing which we should wish to change about this book; and that is, that we must wait two years for its successor.

J. H. B., JR.

A Treatise on the Constitutional Limitations, which rest upon the Legislative Power of the States of the American Union. By Thomas M. Cooley. Seventh Edition. By Victor H. Lane, Professor of Law in the University of Michigan. Boston: Little, Brown, and Company. 1903. pp. cxxiii, 1036. 8vo.

When a law treatise as well known and as much quoted and of as high authority as Judge Cooley's Treatise on Constitutional Limitations has not been re-edited in thirteen years, a new edition is very welcome. Judge Cooley first published his treatise in 1868. The text and footnotes then covered six hundred and thirty-three pages of law octavo, and contained about thirty-five hundred citations. Within fifteen years the work went through five editions, and in the fifth, published in 1885, had been increased to seven hundred and ninety-one pages of text and footnotes containing about eight thousand citations. The work on all these editions was done by the author himself. In 1890 a sixth edition was published which differed from the fifth mainly in the addition of some two thousand cases. The text was little altered, and covered the same number of pages as the fifth.

The present edition is the work of Professor Lane of the University of Michigan. The text proper has not been altered. The addition of more than three thousand new cases has, however, increased the book about one hundred and fifty pages. The editor's work in bringing the book to date has been carefully done, and all the important cases of recent years seem to have been included in the volume. Some of these have been inserted in brackets in the old footnotes, while others have been made the basis of new notes by the present editor on topics suggested by but not discussed in the text. One difficulty, however, lies in the fact that these notes are not in the nature of additional text, but are collections of the points decided in numbers of more or less closely connected cases, the editor's work apparently being a condensation and restatement of the headnotes of these cases. As the index to this edition is practically the same as that of the sixth edition, much valuable information is not made as accessible as it might be by a larger generalization.

Citations are made in this edition to the American State Reports and to the Lawyers Reports Annotated, and duplicate references are made to all cases which are printed in the National Reporter System. This should prove to be an excellent change. In regard to the order of the citations there is room for some improvement. For the most part the scheme seems to be to cite the cases from a single jurisdiction beginning with the latest and going to the earliest. In some instances, however, citations have been made in the inverse order, and in some few others without regard to any system.

CASES ON CRIMINAL LAW. A selection of Reported Cases on Criminal Law. By William E. Mikell, Professor of Law in the University of Pennsylvania. Philadelphia: International Printing Co. In two volumes. Vol. II. 1903. pp. 505–983. 8vo.

The second volume of Professor Mikell's Cases on Criminal Law consists of cases on specific crimes, the general principles of criminal law having been treated in the first volume. It is of course impracticable in a case-book on this subject, especially in one designed for use in law schools, to include cases on every species of crime. Only the more important subjects can be considered. The editor is met at the outset, therefore, with the difficulty of deciding what to leave out. Professor Mikell's choice is, in the main, good, but it is believed that he might well have omitted the short chapters on false imprisonment and abortion, which contain but one or two cases. The subject of conspiracy, which would perhaps most naturally be taken up as a specific crime, was treated in Vol. I. in the chapter on the criminal act.

In subdividing chapters the editor has carried out the plan of his first volume, and has arranged his cases in as complete a classification as the subjects allow. The selection of cases on personal injury is very good, the choice of reported decisions to illustrate the various means by which death may be caused so as to entail criminal responsibility being particularly happy. In the chapter on homicide there is a group of cases on the subject of jurisdiction which in the "Cases on Criminal Law" of Professor Beale is considered under a separate chapter in that part of the volume which deals with the general principles of criminal law. The chapter on larceny, which for a work of this kind must be a most vexatious subject to arrange, is quite satisfactory. Of the subdivisions of this subject the one entitled "Trespass" is by far the most comprehensive, including cases which in Professor Beale's collection would come under his subheading, "Possession," and also cases of larceny by a bailee, by breaking bulk, and by trick The last three classes of cases might more naturally be placed in a separate subdivision, since they form anomalous exceptions to the general rule that larceny includes a trespass.

Most of the cases, as might be expected, are taken from English reports, but a fair number of American cases are included. The recent cases are happily chosen and illustrate well the points for which they are inserted. The editor has appended an index, which adds greatly to the value of the collection as a book of reference.

HISTORICAL INTRODUCTION TO THE ROMAN LAW. By Frederick Parker Walton, Advocate of the Scottish Bar, Professor of Roman Law and Dean of the Faculty, McGill University. Edinburgh and London: William Green & Sons. 1903. pp. xi, 256. 8vo.

"With the exception of the Bible there is no book which has so profoundly affected western civilization as the Corpus Juris." With these suggestive words Dean Walton begins his clear and interesting summary of the history of the Roman Law before Justinian. Intended as an introduction to the study in Montreal of the Roman law in its modern form, and especially as it appears today in the law of the Province of Quebec, it is equally valuable for one who is to learn the modern Civil law and for one to whom Roman law is of interest only as a wonderful and effective example of the human intellect applied to the complex affairs of an imperial civilization. Dean Walton describes clearly and convincingly not only the history of important legal doctrines, but also the constitutional history of Rome so far as it had to do with the making of law. The author's learning is evident, but not obtrusive; his grasp of the subject is complete; his enthusiasm is, even to a devotee of the Common Law, almost contagious. Of especial value to a student of English law are his description of the growth of the commercial law at Rome, his explanation of the ante-Justinian sources of law, and his theory of the development of the *jus gentium*. In publishing in so handy a form just the facts about the history of Roman law that we most need to know, Dean Walton has deserved the thanks of the profession.

J. H. B., JR.

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by William Mack and Howard P. Nash. Vol. VIII. New York: The American Law Book Company. London: Butterworth & Co. 1903. pp. 1145. 4to.

This volume covers topics from "Commercial Paper [XIV]" to "Contemporaneous." The discussion of Constitutional Law, by George F. Tucker, is the principal article, embracing about one-third of the volume. In this article the provision against impairing the obligation of contracts is treated with especial fullness. The distribution of powers among the various departments of government and the provision as to due process of law are also given a prominent place in the discussion. The commerce clause, taxation, and eminent domain are left for treatment elsewhere. Other branches of the subject are discussed with appropriate fullness. The last half of the article on Commercial Paper, dealing with the subject of "Actions," forms a large part of this volume. The discussion deals principally with procedure and treats questions of practice in considerable detail. The other subjects treated at greatest length are "Compositions with Creditors" and "Conspiracy." The collection of labor cases in the latter is especially timely.

The list of subjects chosen for treatment in this volume is well selected and fairly complete. It is to be regretted that there is no general discussion of the principles of the Conflict of Laws. This subject is very inadequately treated by modern writers, and a full collection of recent authorities would be most welcome. All the articles follow the general method of previous volumes.

THE TARIFF PROBLEM. By W. J. Ashley, Professor of Commerce in the University of Birmingham. London: P. S. King & Sons. 1903. pp. viii, 210. 16mo.

A discussion of the tariff problem by the Professor of Commerce in the University of Birmingham is, of course, timely. This short volume by Mr. Ashley should prove of interest to a large circle of readers. It is well and interestingly written; and is made — purposely no doubt — sufficiently simple to be read widely and with understanding even by those who have not had special training in the science of Political Economy. Though it is adapted to popular reading, it is at the same time scholarly. All statements and deductions are shown to be based upon real evidence.

The book contains a statement of the theory of state control in general, and of the policy of free imports as laid down by the classic English school of Political Economy; and then a discussion of those principles and suggestions for modifications which must be made in view of altered conditions, — particularly the growth of fixed capital with its attendant policy of "dumping" excess product abroad at low figures in times of domestic depression.

Mr. Ashley endeavors to show the need of Great Britain for some sort of a protective tariff, and advocates particularly the adoption of a policy of duties giving preferences to the British colonies. He makes out a strong case for protection, — at least for England at this time.

In the gradual creation of a system of imperial interdependence, he sees the brightest future for England; and he believes that the adoption of an inter-imperial preferential tariff would be one of the most important steps toward knitting the empire together.

FIRE INSURANCE AS A VALID CONTRACT, in event of fire and as affected by construction and waiver, estoppel, and adjustment of claims thereunder, including an analysis and comparison of the various standard forms, all reduced to rules, with the rules and statutory provisions of all the states. By George A. Clement. New York: Baker, Voorhis & Company. 1903. pp. xcviii, 637. 8vo.

THE JUDICIAL DICTIONARY of words and phrases judicially interpreted, to which has been added statutory definitions. By F. Stroud. Three volumes. Second Edition. London: Sweet and Maxwell, Limited; Stevens and Sons. Boston: The Boston Book Co. 1903. pp. ccxxvii, 1–592; 593–1394; 1395–2302.

THE MIRROUR OF JUSTICES, written originally in the old French, before the Conquest. By Andrew Horne. To which is added "The Diversity of Courts and their Jurisdiction." Translated into English by W. H. of Gray's Inn. Introduction by William C. Robinson. Washington, D. C.: John Byrne & Co. 1903. pp. xix, 337. 8vo.

COMMENTARIES ON THE LAW OF TORTS. A philosophic discussion of the general principles underlying civil wrongs *ex delicto*. By Edgar B. Kinkead. Two volumes. San Francisco: Bancroft-Whitney Company. 1903. pp. xxx, 1–851; xv, 852–1739. 8vo.

THE EVOLUTION OF LEGAL EDUCATION. Lecture delivered September 19, 1903. By Roscoe Pound, Professor of Law in the University of Nebraska. Lincoln: Jacob North & Co. 1903. pp. 20. 8vo.

CITIZENSHIP OF THE UNITED STATES. By Frederick Van Dyne, Assistant Solicitor of the Department of State of the United States. Rochester, New York: The Lawyers' Co-operative Publishing Co. 1904. pp. xxvi, 385. 8vo.

HANDBOOK OF THE LAW OF WILLS. By George E. Gardner, Professor of Law in the Boston University School of Law. St. Paul: West Publishing Co. 1903. pp. xv, 726. 8vo.

THE ART OF CROSS-EXAMINATION. Together with the cross-examinations of important witnesses in some celebrated cases. New York: The MacMillan Company. London: MacMillan & Co., Ltd. 1903. pp. 283. 8vo.

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by William Mack and Howard P. Nash. Vol. IX. New York: The American Law Book Co. London: Butterworth & Co. 1903. pp. 998. 4to.

THE LAW OF CONTRACTS. By Theophilus Parsons. Three volumes. Ninth Edition. Edited by John M. Gould. Boston: Little, Brown and Company. 1904. pp. cccvii, 609; xx, 801; ix, 749. 8vo.

THE ELEMENTS OF THE FISCAL PROBLEM. By L. G. Chiozza Money. London: P. S. King & Son. 1903. pp 237. 8vo.

SOME ASPECTS OF NEW JERSEY'S CORPORATE POLICY. Address before the Pennsylvania Bar Association, June 29, 1903. By James B. Dill.

HARVARD

LAW REVIEW.

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DETERMINABLE FEES IN AMERICAN JURISDICTIONS.

THE term "determinable or qualified fee"[1] is used habitually by some courts as synonymous with base fee or with fees subject to a conditional limitation, but in the history of English law the distinctions between these three classes of fees are very clear. Sometimes a determinable fee is confused with a fee upon condition, yet the distinction between the two species of estates is fundamental.

A determinable fee was a fee simple estate, but it was subject to a collateral limitation which might destroy it.[2] A gift to A and his heirs so long as St. Paul's stands, is one of the common instances given. When the word "determinable" is applied to a fee, it means an estate which is created by force of the common law, whether it be created by will or by deed.

A fee upon condition resembles a determinable or qualified fee in that it exhausts the whole estate. No remainder can be limited after either a fee upon condition or a determinable fee.[3] Both species of fees leave in the grantor a possibility of reverter, which

[1] In Challis, Real Prop. the word "qualified" as applied to a fee is used with a different meaning from that stated above.

[2] Gray, Rule against Perp. § 13.

[3] See Palmer *v.* Cook, 159 Ill. 300; Kron *v.* Kron, 195 Ill. 181. A fee upon condition must, of course, be differentiated from the conditional fee, which was converted into an estate tail by the statute *De donis*.

is not alienable, but descends to the grantor's heirs.[1] But a determinable fee becomes a fee simple so soon as the contingency on which it is limited becomes impossible to happen; if the contingency happens, the estate is at once determined by force of the limitation, while a fee upon condition continues as a fee simple until entry by the grantor or his heir for breach of the condition.[2]

Base fees always arise upon a conveyance, either voluntary or involuntary, by the tenant in tail or the issue in tail. They are never created by the grantor of the estate which becomes transmuted into the base fee.[3] An involuntary creation of a base fee arose upon the attainder of the tenant in tail for high treason [4] or upon the outlawry for felony of the issue in tail.[5] Instances of base fees created by voluntary conveyance were a grant in fee by the tenant in tail, which gave the grantee a base fee determinable by entry of the issue in tail,[6] or a common fine by the tenant in tail, which created a base fee in the grantee which would endure so long as there was issue of the tenant in tail but no longer,[7] or

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[1] Possibilities of reverter were at common law not assignable. Gray, Rule against Perp. §§ 12, 13. In Massachusetts the right of entry for condition broken is devisable; but the possibility of reverter upon a determinable fee seems not to be assignable, for otherwise, in First Univ. Soc. *v.* Boland, 155 Mass. 171, the remainder after such a fee would have been treated as a conveyance of the possibility of reverter. In Illinois it was said that the right of entry belonged to the grantor, his heirs or devisees, Boone *v.* Clark, 129 Ill. 466; but it was held not to be assignable in Waggoner *v.* Wabash R. Co., 185 Ill. 154. In North Carolina the possibility of reverter after a determinable fee is not assignable. Church *v.* Young, 130 N. C. 8. But in Maine see Moulton *v.* Trafton, 64 Me. 218; and in Pennsylvania see Slegel *v.* Lauer, 148 Pa. St. 236.

[2] Mott *v.* Danville Seminary, 129 Ill. 403. Conditions are often treated as covenants, and the rule is to make them covenants if possible. Los Angeles Univ. *v.* Swarth, 107 Fed. Rep. 798; Gallaher *v.* Herbert, 117 Ill. 160; Boone *v.* Clark, 129 Ill. 466. Often they are trusts, see Jennings *v.* Jennings, 27 Ill. 518.

[3] Christopher Corbet's case, 2 And. 134, found translated in Gray, Rule against Perp. § 35, is express to the point that a base fee is always created by something coming in after the creation of the estate tail, which becomes changed into a base fee. See list of base fees, Challis, Real Prop. 298 *et seq.*

[4] Christopher Corbet's case, 2 And. 134; Gray, Rule against Perp. § 35.

[5] Challis, Real Prop. 301.

[6] Whiting *v.* Whiting, 4 Conn. 179; Perry *v.* Kline, 12 Cush. 118; Buxton *v.* Bowen, Fed. Cas. No. 2260; Buxton *v.* Uxbridge, 10 Met. 87; Hall *v.* Thayer, 5 Gray 523; Young *v.* Robinson, 5 N. J. Law 689; Pollock *v.* Speidel, 17 Oh. St. 439. For a feoffment with warranty see Gilliam *v.* Jacocks, 11 N. C. 310.

[7] 1 Am. L. Rev. 483. George Eliot's base fee in Felix Holt, supplied to her by Frederic Harrison, excited much discussion. Her statement is not very intelligible, but she probably means that John Justus Transome made a settlement upon himself for life, remainder to Thomas, his son in tail male, remainder to Bycliffe in fee. "Thomas, son of John Justus, proving a prodigal, had, without the knowledge of his

a fine with proclamations levied by the tenant in tail in remainder which endured so long as there was issue of the person levying the fine.[1] Base fees differ from determinable fees in that a valid vested remainder in fee may exist after a base fee.[2]

It is perhaps unnecessary to say that conditional limitations are the creatures of the statute of uses and the statute of wills.[3] The contingency upon which a conditional limitation is made is an event which acts as a limitation in cutting off one estate and as a condition precedent to another.[4] Such a limitation of an estate is impossible by mere common law conveyance,[5] although in some states statutes have changed this rule. While the rule against perpetuities applies to conditional limitations,[6] it does not apply to possibilities of reverter after determinable fees.[7]

Ever since the publication of the treatise entitled "The Rule against Perpetuities" by John Chipman Gray, it may be considered as having been demonstrated that the creation of a determinable fee, whether by deed or by will,[8] has been impossible for any one except the sovereign since the statute *Quia emptores*, wherever that statute is in force.[9] But no court in this country

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father, the tenant in possession, sold his own and his descendants' rights to a lawyer-cousin named Durfey." Unless Thomas after his father's death levied a common fine, or unless in his father's lifetime he levied a fine with proclamations, he did not sell his descendants' rights. See for a deed by the issue in tail, Hopkins *v.* Threlkeld, 3 Ha. & McH. 443, and Litt. § 615.

[1] 1 Am. L. Rev. 483; 3 Gray, Cas. Prop. 225. A fine with proclamations levied by the tenant in tail in possession passed a fee simple absolute.

[2] Challis, Real Prop. 52. The remainder must, of course, have been created by the original conveyance, which created the estate tail. It is said in Challis on Real Property that if a gift be made to A and his heirs so long as B has heirs of his body, a determinable fee is created, yet after such a fee existing as a base fee a vested remainder in fee is good. This fact should prove beyond all question that a base fee is not a determinable fee. See the distinction in 10 Rep. 97 b and Fearne, Cont. Rem. 372, 373. The court in First Nat. Bank *v.* DePauw, 75 Fed. Rep. 775, refers to 10 Rep. 97 b, as showing that a remainder is bad after a base fee, but the court must have overlooked the distinction there made.

[3] Gray, Rule against Perp. §§ 52, 135–139.

[4] Gray, Restraints on Alienation § 22, note 1.

[5] A remainder must await the regular determination of the preceding estate.

[6] Gray, Rule against Perp. § 66.

[7] First Univ. Soc. *v.* Boland, 155 Mass. 171.

[8] The cases of Collier *v.* McBean, 34 Beav. 426; Collier *v.* Walters, L. R. 17 Eq. 252; and McFarland *v.* McFarland, 177 Ill. 208, are all cases of collateral limitations of fees created by will, although in the later case there was a gift over.

[9] See Gray, Rule against Perp. § 31 *et seq.* and 3 L. Quart. Rev. 399, by the same author. The reply of Challis, 3 L. Quart. Rev. 403, is wholly inept. The reason of the conclusion stated in Gray, *ubi supra*, is that possibilities of reverter imply tenure,

seems to have been willing to accept a line of reasoning, which is unanswerable.[1] This result is mainly due to the fact that for authority upon this point the courts in this country are content with the confused statements of Blackstone[2] and Kent,[3] who have followed an imposing array of old English lawyers.[4] It would be presumptuous in the writer to again discuss the authorities noticed in Gray on the Rule against Perpetuities, but it may not be unprofitable to consider the later cases, not noticed by him, in order to ascertain what are these limitations that the courts continue to call determinable fees.

The instances of determinable fees to be noticed are divided into two classes: first, fees subject to special limitations, properly called determinable fees; and, second, fees subject to conditional limitations, improperly called determinable fees.

In regard to the first class of cases it may be premised that, assuming a determinable fee to be a proper limitation, the contingency upon which it is limited must be either an event which admits of becoming impossible to happen, or an event which, if it

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"and the Statute *Quia emptores* put an end to tenure between the grantor of an estate in fee simple and the grantee. Therefore, since the Statute, there can be no fee with a special or collateral limitation; and the attempted imposition of such a limitation is invalid." The effect of the statute is noticed in the old cases cited in Gray, Restraints on Alienation § 20. The reasons there given apply with peculiar force to determinable fees. The statute, however, seems to have had a different object. Its preamble (see 1 Gray, Cas. Prop. 386) shows that the purpose of the act was to protect the "chief lords of the fee." This phrase probably referred to the tenants *in capite* of the King, the large landowners. But at that time the phrase "*capitalis dominus*" had no very clear meaning. 1 Pollock & Mait. 212, n. 12, 2 *ibid.* 4, n. 3. It is probable that the statute was a compromise between the great landowners, who were opposed to all alienation by their tenants, and absolute freedom of alienation. 1 Pollock & Mait. 318. The dogma that the King was the chief lord of every fee was not then of much force. But by the time of the Wars of the Roses that doctrine had become thoroughly elaborated and the decisions upon the effect of the statute begin about that time. The King gained everything by the statute. Every alienation compelled the grantee to hold of him, for the grantee could not hold of his grantor by the terms of the statute. This view is confirmed by the fact that prior to the statute *De donis* deeds are found requiring the grantee to hold of the chief lord of the fee, who was probably the grantor's immediate lord. It is apparent that both the reversion after estates tail and the right of entry after condition broken would not be affected by this statute.

[1] The authorities of Gray are rejected in First Univ. Soc. *v.* Boland, 155 Mass. 171.

[2] Blackstone confounds base fees with determinable fees and fees upon condition. 2 Bl. Comm. 110, 154.

[3] Kent confuses fees subject to conditional limitations with base fees, fees determinable, and fees upon condition. 4 Kent Comm. 8. He follows Blackstone with some confusing additions of his own.

[4] The list from Coke to Preston is given in 3 L. Quart. Rev. 403.

does not happen, must forever remain liable to happen.[1] Of the fees made subject to special limitation there are two species: (*a*) created by the sovereign power; [2] (*b*) created by individuals.

(*a*) The general government, by its mineral laws, confers upon the citizen who makes a valid mineral location, an estate which endures so long as the locator performs the annual assessment work upon his claim.[3] This estate descends to the heirs, and is alienable in fee.[4] In the hands of the grantee, or devisee, or heir, it is the same kind of an estate. It seems to fulfil the description of a determinable fee,[5] yet it has been held to be not subject to dower.[6] Similarly, an entryman of a portion of the public domain not mineral obtains by his entry something which corresponds very closely to a determinable fee.[7]

If the theory of a taking of land under eminent domain by a public service corporation were that the government took the land upon payment of full value, and thereupon conveyed it to the corporation, to be held so long as it was used for the public purpose,

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[1] Challis, Real Prop. 227. It is said in Tiedeman on Real Property, § 385, that a limitation upon a contingency which must at some time happen, leaves a reversion in the grantor. He instances a gift to A and his heirs as long as a certain tree stands. He cites as his authorities 1 Preston Est. 440 (but Preston does not so say), and 1 Washburn, Real Prop. 90. Ayres *v.* Falkland (1697), 1 Ld. Raym. 325, says that merely a possibility of reverter remains after the gift of such an estate. This authority seems conclusive.

[2] The statute *Quia emptores* could not apply to the sovereign. Blackstone's determinable fee, created by the sovereign, the limitation of the barony of Lisle to John Talbot and his heirs tenants of the Manor of Kingston Lisle was, however, a limitation of a dignity, not of land. There seems to be a species of estate formerly existing by customary law, now by force of 14 and 15 Vict. cap. 94, in the mining regions of Derbyshire, which answers very closely to a determinable fee. See Bainbridge on Mines (4th ed.) 141; McSwinney on Mines 500.

[3] Jackson *v.* Roby, 109 U. S. 440; O'Reilly *v.* Campbell, 116 U. S. 418. No patent is necessary.

[4] Forbes *v.* Gracey, 94 U. S. 762; Belk *v.* Meagher, 104 U. S. 279; Gwillim *v.* Donnellan, 115 U. S. 45; Noyes *v.* Mantle, 127 U. S. 348.

[5] Some of the cases loosely speak of the mining claim as an estate upon condition. But no entry is necessary to determine the estate. It is true that the mineral claimant, by resuming work, may restore his rights, but that fact does not alter the legal situation. But see Benson M. Co. *v.* Alta M. Co., 145 U. S. 428, and Black *v.* Elkhorn M. Co., 163 U. S. 445, where the court uses some very extraordinary language as to the estate.

[6] Black *v.* Elkhorn M. Co., 163 U. S. 445. This case is put upon a wholly untenable ground. The decision in the Circuit Court of Appeals is put upon a much safer ground. See Black *v.* Elkhorn M. Co., 52 Fed. Rep. 859. The customary mining estate in Derbyshire was subject to dower. Bainbridge on Mines (4th ed.) 141.

[7] McLane *v.* Bovee, 35 Wis. 27.

the estate given to the corporation might be considered a determinable fee; but the different theory of an easement seems to have prevailed, and the statute *Quia emptores* has nothing to do with easements.[1]

(*b*) There are a number of cases which have supported, either by way of *dictum* or actual decision, the creation of determinable fees by private individuals. The decision in each case is put upon the ground that a fee can be made subject to a collateral limitation.

In Moulton *v.* Trafton[2] the facts that appear show that Shirley and wife had conveyed to Moulton certain land, reserving a parcel thereof stated in the deed to have been conveyed to Trafton so long as said Trafton occupied it with mills. Trafton had conveyed to Trafton the defendant, but there was no deed from Shirley to Trafton. The court must have held the reservation to be an exception. It construed the deed as conveying to Moulton all of the land excepting a determinable fee in the portion covered by the exception; and it seems to have been held that the deed conveyed that portion to Trafton. The deed must have been held to have conveyed from Shirley to Moulton the possibility of reverter after the determinable fee.

The same ruling was made where the grantor reserved to himself, out of the land conveyed, a parcel thereof so long as a store stood thereon.[3] This was held to reserve to the grantor a fee determinable. In both of these cases from Maine the statements of the court are purely *dicta*. In the first case an exception, in the second case a reservation, regardless of the extent of estate excepted or reserved, defeated the plaintiff. It was not necessary to characterize the estate. But it seems reasonably certain that if the question ever arises, that court will sustain what it calls "a base, qualified, or determinable fee."

In Pennsylvania, a state where *Quia emptores* is probably not in force,[4] it was held that a gift of land, so long as the same was not built upon, and was used in connection with a certain jail, created a determinable fee, which was held to have reverted to the grantor's

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[1] See Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 94 Ill. 83, where the court thought it was dealing with a determinable fee.

[2] 64 Me. 218. Whether a reservation or exception was involved, see Gould *v.* Howe, 131 Ill. 490.

[3] Farnsworth *v.* Perry, 83 Me. 447.

[4] Gray, Rule against Perp. § 26.

successor in interest, when the land ceased to be used in connection with the jail.[1] It was said expressly that this was not an estate upon condition.

In Grant *v.* Allen [2] a devise to a wife in fee, provided, however, that in case she married again the land should be divided among testator's children, was said to have created "a base or qualified fee" in the wife. But it ought to have been apparent to the court that this was a conditional limitation, which was good as an executory devise.[3] The Illinois court reached the same conclusion in regard to a similar devise in Illinois. It was called "a base, or determinable fee."[4]

The preceding cases were decided without any reference to the statute *Quia emptores*. It was assumed on the authority of Blackstone that "a base, qualified, or determinable fee" could be created. But in First Univ. Soc. *v.* Boland,[5] the court met the proposition fairly, and held that there was no legal impediment to the creation of a determinable fee. It was held that a gift of land in fee so long as it should be used for the propagation of certain religious doctrines, and when diverted from that purpose, remainder in fee to certain persons named, created a determinable fee with a possibility of reverter in the grantor and his heirs. The remainder over was held void for remoteness, but the possibility of reverter was held not to be within the rule against perpetuities. The statement as to the nature of the fee was *dictum*, for it was not necessary to decide whether the estate was a fee upon condition or a determinable fee.

An exceedingly peculiar determinable fee was held to have been created by a testator who devised certain lands, upon which an insane asylum was situated, to three persons named, to have and to hold the same so long as the devisees carried on upon the land

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[1] Slegel *v.* Lauer, 148 Pa. St. 236. Earlier cases decided the same point.

[2] 100 Mo. 293. Challis, Real Prop. 230, would probably call this a determinable fee, but that authority is not cited in the opinion. If the limitation had been to the wife and her heirs until she remarried, without any limitation over, this court would logically be compelled to hold that the estate created was a determinable fee.

[3] The contingency must have happened within the limits assigned by the rule against perpetuities.

[4] Becker *v.* Becker, 206 Ill. 53.

[5] 155 Mass. 171. The court seemed to think that there was some reason for assuming the rule in Massachusetts to differ from the rule in England. The remainder in fee after the determinable fee is void not on account of remoteness, but because a fee cannot be limited after a fee, except by the aid of the statute of uses, or of wills, or some statute permitting a deed to be so drawn.

an institution for the insane.[1] It was further provided that if the devisees should at any time deem it inexpedient or unprofitable to carry on the institution, then on their written request the testator directed his executors to sell the real estate and divide the proceeds among certain persons, three of whom were the devisees. The case arose upon a bill in equity to ascertain the interests of the respective parties.[2] It would seem therefore that the court's holding that this was a fee in the devisees, determinable upon the written request of two of them, was not *dictum*.[3]

The case of Aultman Co. *v.* Gibson's Guardian [4] was a devise to the wife during widowhood, remainder to the children, the children of a deceased child to take in place of its parent. It was held that such child, living at the death of the testator, took a fee determinable upon his dying during the life of the wife, and since the estate of one child had been sold upon execution in his life and the child had died before the wife, the execution purchasers' estate was thereby determined.

The foregoing cases would, no doubt, be considered as authorities for the proposition that a determinable fee can now be created by individuals other than the sovereign.

The second class of what the courts call determinable fees arises upon gifts of fees conditioned upon a failure of issue. Some of the instances are easily explained as executory limitations, others cannot be so explained. The cases turn upon the point whether the gift over is upon an indefinite failure of issue, *i. e.* at any time after the donee's death, or upon a definite failure of issue confined to the date of the grantee's death.[5] The difference between the two

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[1] McFarland *v.* McFarland, 177 Ill. 208. This should have been considered nothing more than a life estate, but under the section of the statute which gives a fee unless a smaller estate is indicated, it was held to be a fee.

[2] The grounds of jurisdiction do not very clearly appear.

[3] In other words, the devisees were given the power to deprive themselves of a fee, even though they refused to continue the testator's cherished asylum. *Quære*, if the devisees conveyed by warranty deed a fee simple and then determined their fee by direction to the executors, could they share in the proceeds of the executors' sale? Or would their equitable estate enure to their grantees after the grantees' fee was determined?

[4] 67 S. W. Rep. 57 (Ky.). The children either took a vested remainder in fee, or they took an estate tail, which the statute converted into a fee. The decision is exactly what it would have been at common law, if the child had an estate tail. The remainderman in tail sells only his interest.

[5] It is not necessary to notice the case of a failure of issue confined to the life of the testator. See Matter of New York, etc., R. Co., 105 N. Y. 89.

limitations is perfectly clear.[1] In case of a gift over upon an indefinite failure of issue, which is always favored by the English law,[2] an estate tail is created in the first taker and the remainder over in fee is a vested remainder.[3] But in case of a gift over upon a definite failure of issue, the grantee takes a life estate, the issue take by implication a remainder in fee, which is contingent,[4] and the gift of the remainder over in fee is an alternative contingent remainder.[5] After these two contingent remainders there is always a reversion in the grantor, which is a true reversion and not a mere possibility of reverter.[6]

The decisions in the cases to be noticed are complicated by the fact that in most of the states there are statutes which convert estates tail either into estates in fee simple in the donee in tail,[7] or into a life estate in the donee in tail with a remainder in fee to the issue in tail, who take under the terms of the gift.[8] It must be reasonably apparent that every state which has such a statute must recognize the statute *De donis* as in force, for it is by that statute

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[1] See Gray, Rule against Perp. §§ 211–213.

[2] 2 Jarman on Wills 337, 408, 416.

[3] Boatman *v.* Boatman, 198 Ill. 414; Chapin *v.* Nott, 203 Ill. 341. See Gray, Rule against Perp. § 111. But in Hanley *v.* Kansas, etc., Co., 110 Fed. Rep. 62, land was devised to a trustee and his successors for two hundred years, remainder in fee to the county upon trust. The trust for two hundred years was to permit a former slave of the testator and the children of her body and their descendants to receive the rents and profits. There were other provisions in the will, but they are not material to the court's decision. On the authority of Gray, Rule against Perp., the remainder was held bad for remoteness. It is singular that a work so carefully precise in its statements should have produced this extraordinary decision.

[4] Burton *v.* Black, 30 Ga. 638; Wetter *v.* Cotton Press Co., 75 Ga. 440; Gray, Rule against Perp. 113 a, citing the older cases, Loddington *v.* Kime, 1 Salk. 224, Doe *v.* Holme, 3 Wils. 237; Goodright *v.* Dunham, Doug. 234 (per Lord Mansfield); Fearne, Cont. Rem. 225; Peoria *v.* Darst, 101 Ill. 609.

[5] The old cases cited in the last note show that the alternative remainder must be contingent, and to the same effect, Peoria *v.* Darst, 101 Ill. 609, but Chapin *v.* Nott, 203 Ill. 341, Boatman *v.* Boatman, 198 Ill. 414, wrongly held the second remainder to be vested. This is impossible, for a life estate with a vested remainder in fee exhausts the whole estate. There would be no room for a contingent remainder in fee. The court seemed to have forgotten that all remainders in fee after a contingent remainder in fee must also be contingent. Allison *v.* Allison Ex'rs, 44 S. E. Rep. 904 (Va.).

[6] Gray, Rule against Perp. §§ 11, 113 a. But in Dunwoodie *v.* Reed, 3 Serg. & R. 435, Chief Justice Tilghman says that two alternative remainders in fee are but the limitation of one indefeasible estate in fee. This is certainly plausible, but it must be wrong, for it puts the fee in abeyance.

[7] Indiana, Maryland, Mississippi, North Carolina, New York, Virginia, and other states.

[8] Illinois, Missouri, and New Jersey are instances of this class.

alone that estates tail exist.[1] The difference in the statutes as to estates tail creates two very well marked classes.

Wherever an estate tail is converted by statute into a fee simple an unexpected obstacle is put in the way of grantors or testators who desire their real property to descend to the issue of a given person, and, if that issue fails, to still further control the devolution of the property. If the property is given over upon an indefinite failure of the issue, an estate tail is created, which the statute converts into a fee simple in the first taker, with the result that the first taker acquires full power of alienation, and at the same time the remainder over is absolutely void as a remainder, and is void as an executory devise because the failure of issue is not confined to a period within the rule against perpetuities. Hence the courts in those states have considered themselves justified in holding that the words "dying without issue" mean a failure of issue at the donee's death. This does not help the matter to any extent, since the donee under such a limitation would take merely a life estate, there being a remainder in fee to the issue. Hereupon the courts go further and say that the donee takes a fee simple determinable upon his leaving issue him surviving. This step seems to be taken in order to give the donee the power to alienate a fee, but since he can alienate only a determinable fee which may be defeated by his dying without issue surviving, it is difficult to see how the situation is improved, or how the determinable fee, except on the ground of probability, is worth more than a life estate.

Some of the cases show the most astonishing confusion in the minds of the judges. In one opinion[2] the court holds a conditional limitation of a fee after a fee to be good in a deed not operating under the statute of uses, for the reason that it is good under the statute of uses, and that statute was merely declaratory of the common law. In the same opinion it was said that a conditional limitation of a fee after a fee upon a definite failure of issue was what "Lord Coke" calls "a base or qualified fee." Comment upon such amazing deliverances is unnecessary.

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[1] In Rowland *v.* Warren, 10 Ore. 129, it is suggested that such a statute repeals the statute *De donis*. If so, the old conditional fee at common law must be restored as it exists in South Carolina, where the statute *De donis* has never been in force. In regard to another statute as to estates tail it was argued that the conditional fee at common law was restored, but the court held otherwise. Frazer *v.* Supervisors, 74 Ill. 282.

[2] Bryan *v.* Spires, 1 Leg. Gaz. 191. The case is referred to simply as a curiosity.

The case of Grout *v.* Townsend[1] arose in New York, where a statute converts an estate tail into a fee simple. The court in this case was of opinion that a devise to a woman and the heirs of her body forever, but if she died without issue, remainder over in fee created an estate tail in the woman, which the statute converted into a fee simple, and that therefore the remainder over was void as a remainder but good as an executory devise, because the failure of issue was upon a definite failure of issue at the donee's death. The conclusion was there reached that the woman took a fee simple determinable upon her dying without issue surviving her. It is not often that a court can hold the very same words to mean both an indefinite failure of issue in order to create an estate tail and a definite failure of issue in order to create a determinable fee.[2]

The case of Davis *v.* Hollingsworth[3] presents the case of a gift by deed in a state where every executory limitation which is possible in a will is also good when contained in a deed. A gift was made to a daughter and her child or children should any be born to her, but in the event that the daughter should die without any child or children surviving her, the land should revert to the donor if living, or to his heirs if he was dead. The court construed this to mean that if the daughter died without issue living at her death, the limitation over should take effect. The limitation over was simply the reversion which the law implied, and hence the gift, under the doctrine of Wild's case,[4] was an estate tail, but even if not so, it was a life estate in the daughter, contingent remainder to the issue living at her death. The daughter, never having had a child, alienated in fee, then a child was born, who after the daughter's death brought ejectment. The daughter was held to have taken not an estate tail but a fee determinable upon her leaving issue. Thus it appears by construction that the statute

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[1] 2 Denio 336. The court seems to have decided at last that the limitation was to the woman and her heirs until she died without issue her surviving. Even Challis, Real Prop. 228–233, in his list of conditional limitations, shifting uses, and special limitations, which he classes as determinable fees, does not venture on such a qualified fee as the one stated in this case. It is needless to say that it was a life estate to A, implied contingent remainder in fee to the issue, if the limitation was upon a definite failure of issue.

[2] See Mott *v.* Fitzgibbon, *infra*, for a similar case.

[3] 113 Ga. 210. In this case the daughter's child had the fee simple. The limitation cannot be construed to be to the daughter for life, contingent remainder in fee to the unborn children.

[4] 6 Rep. 17.

De donis is repealed, and that the old conditional fee at common law is restored to the extent that the issue must not only be born, but survive the donee, in order to give the donee a fee simple.[1]

In Mott *v.* Fitzgibbon[2] a gift to a son for life, and upon the death of the son without issue, remainder over in fee, was held to be an estate tail in the son converted into a fee simple by statute, but this fee was determinable upon the son dying without leaving issue him surviving. This opinion is manifestly absurd, since a definite failure of issue means that the issue take as purchasers, whereas in case of an estate tail the issue must take by descent.

By statute in the state of Kentucky any limitation that is good in a will is good in a deed, and by a second statute any limitation after an estate tail is good if it would have been good when limited after a fee simple. It is plain that the first statute cannot apply to estates tail, unless the first statute is read into the second. With the statutory law in this condition a deed was made to B and the heirs of his body, and if he should die without issue, remainder over in fee.[3] B had alienated, but had died leaving issue. He was held to have taken a fee determinable, and upon his death fulfilling the condition, his grantee took a fee simple absolute.[4]

In this second class of determinable fees arising from gifts subject to a failure of issue, decisions are met which are based upon a statute which converts a fee tail, of which any one shall become seized, into a life estate in the donee, and "the remainder shall pass in fee simple absolute to the person or persons to whom the estate tail would, on the death of the first grantee, devisee, or donee, in tail, first pass, according to the course of the common law."[5] This

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[1] The existence of issue is thus given a retrospective operation.

[2] 107 Tenn. 54. The remainder in fee could not be an executory devise. If it was after an estate tail, it was vested; if it was after a definite failure of issue, it was contingent. Viewed from any standpoint, the decision is inexplicable. But in Scottish-Am. Co. *v.* Buckley, 33 So. Rep. 416 (Miss.), a deed to three sons in fee, and if either died without leaving a child or children surviving, remainder in fee to survivor or survivors or their children, was held to be a vested remainder in the survivor. In Whitfield *v.* Garriss, 42 S. E. Rep. 568 (N. C.), on a similar limitation it was held that a devise to A, but if he died leaving no heirs, remainder over, gave a determinable fee.

[3] Louisville T. Co. *v.* Erdman, 58 S. W. Rep. 814 (Ky.). In Kentucky the court has argued itself into the belief that estates tail are unlawful, in spite of the fact that the statute expressly recognizes their validity.

[4] See also Calmes *v.* Jones, 63 S. W. Rep. 583 (Ky.). In Martin *v.* Hafer, 82 N. W. Rep. 1053 (Mich.), another unique decision of this description may be found.

[5] 1 Starr & Curtis 917. The framers of this statute evidently supposed that the statute *De donis* was a part of the common law. See Frazer *v.* Supervisors, 74 Ill. 282, where it is held that this statute did not restore the common law.

statute no doubt applies to estates in remainder as well as in possession.[1]

The first inference from this statute would be that since the persons to take in remainder on whom the estate would descend cannot be ascertained until the death of the first taker, the remainder in fee is contingent.[2] The statute simply transforms the estate tail into a limitation to the donee for life, remainder in fee to the issue surviving at the death of the donee in tail. It is, so far as the limitation is concerned, wholly immaterial whether the gift is to A and the heirs of his body or to A for life, remainder to his issue him surviving. The statute causes the former limitation to be the latter. The statute, of course, abolishes the Rule in Shelley's case as to estates tail.[3] Before the statute a remainder in fee after an estate tail was vested.[4] But under the statute the limitation would read as if it were to A for life, contingent remainder in fee to his issue him surviving, but if A die without issue him surviving, contingent remainder over in fee to B.

The first remainder in fee must be contingent; it cannot be vested, otherwise the second remainder would be bad.[5] The second remainder must be contingent, for it follows a contingent remainder in fee. Both remainders can be valid only on the ground that they are alternative contingent remainders.[6] This is the rule of the common law.

But singularly enough, in the state of Missouri a totally different view of the statute gives a life estate to the donee in tail, and the remainder in fee vests in the issue as soon as any issue comes into being.[7] This, of course, makes the estate vest in the children of

[1] It is treated as applying to remainders in many of the following cases. The statute which turns estates tail into estates in fee simple does so apply. Vanderheyden *v.* Crandall, 2 Denio 9; Van Renssalaer *v.* Kearney, 11 How. (U. S.) 297.

[2] See Olney *v.* Hull, 21 Pick. 311; Smith *v.* Rice, 130 Mass. 441; Thomson *v.* Ludington, 104 Mass. 193; Dunwoodie *v.* Reed, 3 Serg. & R. 435.

[3] Frazer *v.* Board, 74 Ill. 282; Cooper *v.* Cooper, 76 Ill. 57; Lehndorf *v.* Cope, 122 Ill. 317.

[4] Boatman *v.* Boatman, 198 Ill. 414; Chapin *v.* Nott, 203 Ill. 341. In Smith *v.* Kimball, 153 Ill. 368, the court had said that a fee could not be limited after an estate tail. It followed 4 Kent Comm. 275, where the statement is made, but Kent was confused and was stating the rule as to chattels.

[5] No remainder in fee can be limited after a fee except by way of alternative remainder. See the cases next cited.

[6] Loddington *v.* Kime, 1 Salk. 224; Doe *v.* Holme, 3 Wils. 237; Goodright *v.* Dunham, Doug. 234; Fearne, Cont. Rem. 225; Allison *v.* Allison Ex'rs, 44 S. E. Rep. 904 (Va.); Peoria *v.* Darst, 101 Ill. 608.

[7] Garth *v.* Arnold, 115 Fed. Rep 468 (C. C. A.): A deed was made to A, habendum to A and the heirs of his body. A had seven children at the date of the convey-

the donee. The remainder is construed to be a class, and opens to let in afterborn children.[1] But if a child dies without issue before the death of the first taker, the vested remainder is not thereby divested, but the heirs of the deceased child take.[2] This ruling makes the limitation by the statute read to A for life, remainder in fee to his children, without more. Under this ruling, if A has two children and one child dies without issue before A, the fee in remainder upon the death of A does not vest in possession in the issue of A, the single child surviving, but one half of the devise vests in possession in the heirs of the deceased child. Yet the statute says that the remainder in fee after the life estate shall pass to the person or persons to whom the estate would go on the death of the first grantee. Again, suppose a remainder in fee to be limited over after an estate tail; it is destroyed by the birth of a child to the donee in tail. It cannot take effect as an executory devise to defeat the remainder in fee in the child and its heirs. Before the birth of a child it was not an executory devise, for at common law it was a vested remainder, and under the statute it was a contingent remainder.[3] Another astonishing result is that if in Missouri an estate is given to A, remainder in fee to B, and A has a child living at the time of the gift, the remainder over is neither remainder nor executory devise.[4]

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ance. In the lifetime of A three children died without issue. The remainder created by the statute was held to be vested, and the heirs of each of the three deceased took one seventh in remainder. Had there been a remainder over after the estate tail, the court would never have reached this astonishing conclusion. The court treated the statute as if it made a limitation to the first taker, remainder in fee to his children. In the Circuit Court (Arnold *v.* Garth, 106 Fed. Rep. 13), on the authority of the Missouri cases, Emmerson *v.* Hughes, 110 Mo. 630; Clarkson *v.* Hatton, 143 Mo. 47, the remainder was properly held to be contingent. Whether the courts of Missouri will follow this high Federal court remains to be seen.

[1] Garth *v.* Arnold, *supra.*

[2] Garth *v.* Arnold, *supra.* In any event the court ought to have held that the failure of a child's issue before the death of the first taker, divested its remainder.

[3] Since a remainder after an estate tail must necessarily be upon failure of issue, the only other alternative is to say that under the statute the limitation is to A for life, remainder in fee to his children, but if A die without having had issue, remainder over. These two remainders in fee would probably be considered alternative.

[4] This must be the result. It may be considered a good executory devise until the issue comes into being. The limitation reads according to the above ruling: to A for life, remainder in fee to his unborn children, but if A dies without issue surviving him, remainder over. Now, if no issue of A be born, the executory devise may take effect. But since the remainder in fee vests in the issue as soon as born, the executory devise over is gone, for the remainder descends to the heir general of the issue. It is not as if the limitation read to A for life, remainder to his children, but if any child dies in the

In Illinois, on the other hand, the courts have reached a conclusion diametrically opposed to the above result. In order to avoid the effect of the statute as to estates tail, they began by holding that a gift over upon a failure of issue would be treated as a gift over upon a definite failure of issue, to wit: a failure of issue at the death of the grantee.[1] But this was wholly unnecessary, for that had been held to be the effect of the statute. Wherever a gift was made to a man and the heirs of his body, the statute was applied, and the gift was held to be a life estate in the donee, remainder in fee to those answering the description of heirs of the body at the death of the donee.[2] Wherever a gift of the remainder in fee was made upon failure of issue, the court held it to be a definite failure of issue, and construed the first remainder to the issue to be contingent, and the second remainder to be an alternative contingent remainder.[3] Then there came a period when the court held that the grantee took a fee determinable upon his dying without issue.[4] But in the latest case the court has returned to its first theory of two alternative remainders.[5]

But the court appears to have taken a peculiar view of the first contingent remainder in the issue in tail. That remainder seems, according to the court's decision, to vest in the issue in tail when born; but if the issue dies in the lifetime of the first taker, its share descends only to its issue,[6] and not to the heir general of the deceased child, and if it dies without issue during the lifetime of the first taker, that particular issue is eliminated, and at the death of the donee in tail the issue then living take the remainder in fee. It thus appears that during the lifetime of the donee the remain-

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lifetime of A, his share to go to the survivor, and if all the children die in the lifetime of A, then over to B in fee. Wilbur *v.* McNulty, 75 Ga. 463. In the latter case the vested remainder in a living child becomes divested on its death in the life of A. See Smith *v.* West, 103 Ill. 332, incorrectly decided.

[1] Friedman *v.* Steiner, 107 Ill. 125; Peoria *v.* Darst, 101 Ill. 608.

[2] Blair *v.* Vanderclum, 71 Ill. 290; Lehndorf *v.* Cope, 122 Ill. 317; Lewis *v.* Pleasants, 143 Ill. 271, and other Illinois cases until the decision of Melzen *v.* Schopp, 202 Ill. 275.

[3] Peoria *v.* Darst, 101 Ill. 608, citing Loddington *v.* Kime, 1 Salk. 224.

[4] Friedman *v.* Steiner, 107 Ill. 125; Summers *v.* Smith, 127 Ill. 645; Post *v.* Rohrback, 142 Ill. 600; Smith *v.* Kimball, 153 Ill. 368; Lombard *v.* Witbeck, 173 Ill. 396; Koeffler *v.* Koeffler, 185 Ill. 261; Chapman *v.* Cheney, 191 Ill. 574; Gannon *v.* Peterson, 193 Ill. 372; Bradley *v.* Wallace, 202 Ill. 239.

[5] Chapin *v.* Nott, 203 Ill. 341.

[6] This appears to be an estate tail *pur autre vie*. There is strictly no descent to the issue of issue, but that issue holds as special occupant, although there is no such hint in any of the opinions.

der to the issue is treated as an estate tail; it becomes a fee simple upon the death of the donee in tail.[1] If no issue survive the donee, the other remainder in fee takes effect. It thus appears that there is one species of estate tail upon which the statute has no effect.

But the second remainder in fee, limited upon the definite failure of the issue, has received even more remarkable treatment. Although it is a remainder in fee alternative to another remainder in fee, it is solemnly asserted by the court that it is a vested remainder,[2] because, being a limitation to a man and his heirs, there is always some ascertained person in being to take, if the prior estates determine.[3] This result is exceedingly startling, not to say astounding. It is impossible to limit a remainder in fee after a vested remainder in fee, and it is none the less impossible to limit a vested remainder in fee after a contingent remainder in fee.[4] It is in effect saying that the vesting of the prior contingent remainder in fee divests the subsequent vested remainder in fee.[5]

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[1] Butler *v.* Heustis, 68 Ill. 594. In this case it is said that under the limitation of an estate tail, the first taker would take a life estate, the remainder would pass in fee simple to her children, opening to let in afterborn children and subject to be divested as to such as should die without issue. This statement is in fact *dictum*. In Voris *v.* Sloan, 68 Ill. 588, where a remainder was limited to C for life, remainder to the heirs of her body, and in case she should die without issue, reversion to grantor and his heirs, it was held that the dying without issue meant without having had issue. This hints at the old conditional fee at common law. Then it is said that this means a general failure of issue, that C took a life estate, remainder in fee vested in the heirs of C's body at their birth, and as to the two children who were dead without issue, C took as one of the heirs. This decision is wholly incomprehensible. But the two cases above, delivered apparently at the same time, are irreconcilable. In Frazer *v.* Supervisors, 74 Ill. 282, as to an estate tail, the court says that under the statute the heir takes at birth a fee simple. This is a startling commentary on *nemo est hæres viventis*. It is further said that the children when born take an absolute fee. Later in Peoria *v.* Darst, 101 Ill. 609, it is said that the contingent remainder in fee of the issue in tail is a mere contingent right, and if the issue dies before the life tenant, nothing passes to the heirs by descent. This is perhaps the controlling authority.

[2] Boatman *v.* Boatman, 198 Ill. 414; Chapin *v.* Nott, 203 Ill. 341. Compare Chapin *v.* Crow, 147 Ill. 219, which appears to be *contra*.

[3] Chapin *v.* Nott, 203 Ill. 341. The inaccuracy of the definition of the Revised Statutes of New York here appears in all its baldness. See Gray, Rule against Perp. § 107.

[4] Loddington *v.* Kime, 1 Salk. 224; Doe *v.* Holme, 3 Wils. 237; Goodright *v.* Dunham, Doug. 234; Fearne, Cont. Rem. 225. These old cases are not very accurate in their expressions. It must be plain that "without having had issue" is a very different thing from "without leaving issue surviving."

[5] The court seems to have been driven to these decisions by an impression that a contingent remainder does not descend to the heirs. The court was wholly confused between the two meanings of the word "vested." See Gray, Rule against Perp. § 118.

It may seem that this discussion as to this statute had led us far afield from the subject of determinable fees. But the point of the matter is, that after considering the limitation over upon failure of issue in accordance with the rules of law, the court seemingly, in order to avoid the effect of giving the first taker merely a life estate, changed its ground to giving the first taker a determinable fee. Very frequently this view is taken in order to protect a purchaser from the first taker.[1] In other cases the determinable fee seems to have been invoked in order to give the first taker an estate larger than a life estate, on some peculiar ground that was present to the court.[2] In two cases the court seemed to think that because the first taker was given an absolute power of alienation, he ought to be given a determinable fee,[3] but at the same time have, during his life, an absolute power of alienation.[4] In another case the determinable fee was invoked in order to destroy an attempt by a grandfather to make his estate inalienable until the end of the lives of his grandchildren,[5] depriving them at the same time of any control over the income. The legal estate was given to trustees to hold until the death of the last grandchild upon trust to pay the income to the grandchildren, and upon the death of any grandchild to its issue, and in default of such issue to the survivor

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[1] In Smith *v.* Kimball, 153 Ill. 368, a devise had been made to a woman, and should she die leaving no heirs, remainder over. She had issue living, and was attempting to force her title as a fee simple upon a purchaser.

[2] In Summers *v.* Smith, 127 Ill. 645, there being a gift over upon failure of issue, the same result precisely would have been reached, if the court had held that the first taker took a life estate, contingent remainder in fee to his issue surviving, contingent remainder in fee upon the definite failure of issue. Friedman *v.* Steiner, 107 Ill. 125, was a devise to the wife and her heirs and assigns, provided that in case the said wife died intestate and without leaving lawful issue her surviving, then over in fee. The court seemed to think that this could not be an estate tail on account of the word "assigns." But that word did not, of course, alter the estate. The wife was held to have full power of alienation. If so, the devise over was necessarily bad. See note 3, *infra*. As a matter of fact the gift over upon intestacy was bad. See Gray, Restraints on Alienation §§ 59, 61–75, collecting many, perhaps all, the cases. Yet the court held apparently, because the wife was living, having had no issue, and the action was by a co-tenant for partition, that she ought to be given the largest estate possible, which was to them a determinable fee, with a full power of alienation by deed or by will. She had, it is needless to say, a fee simple absolute.

[3] Friedman *v.* Steiner, 107 Ill. 125; Koeffler *v.* Koeffler, 185 Ill. 261. In both cases the devise over was bad. Healey *v.* Eastlake, 152 Ill. 424; Jones *v.* Port Huron Co., 171 Ill. 502; Saeger *v.* Bode, 181 Ill. 514; Dalrymple *v.* Leach, 192 Ill. 51.

[4] See the first two cases cited in the preceding note.

[5] Lombard *v.* Witbeck, 173 Ill. 396. In some way the court added the equitable estate in the grandchildren to the legal remainder given to their issue to make up a determinable fee in the grandchildren.

or survivors; the legal remainder in fee was given to the issue of the grandchildren surviving at the death of all the grandchildren, such issue taking *per stirpes*. The court held the estate given to be a fee in each grandchild determinable during the life of the longest living grandchild upon the grandchild dying leaving no issue surviving, and made the fee in the three grandchildren determinable upon all three dying leaving no issue surviving, and created cross-determinable fees among the grandchildren. In some mysterious way the trustees were dispossessed of the accumulated income over which they had been given absolute control. The result is sufficiently extraordinary.

It will be seen that all these cases are instances where an estate is given, but if the donee die without issue, remainder over. According to the authority of other cases decided in Illinois, the limitation in every case ought to have been treated as creating contingent remainders. It does not help the situation to give the first taker a determinable fee, for such an estate is worth but little more than a life estate. A purchaser from the first taker, if he prays for more than a life estate, takes the risk either that issue will be born and survive, or that the issue, if in being, will survive the first taker. In either case such a title is not marketable.

As a practical question there is not a very great difference in result between the theory of alternative remainders and the theory of determinable fees. If no issue be born, the first taker obtains but a life estate. If issue be born but do not survive, the first taker, under the theory of a determinable fee, has but a life estate, and the gift over takes effect as an executory devise; and under the theory of alternative remainders the first taker has a life estate, and the gift over takes effect as the vesting in possession of the estate in remainder. If issue be born and survive the first taker, the result as to those who take by descent is the same under both theories, but in the case of determinable fees the first taker's alienation is that of a fee simple, while under the theory of alternative remainders he has but a life estate, and can alienate no greater estate.

The general result of these so-called determinable fees is that in the states which convert an estate tail into a fee simple the statute *De donis* is nullified by saying that no estate tail is created, and the statute as to estates tail is nullified by depriving the first taker of a fee simple absolute. If the land passes to the heirs, the heirs

of the body alone take on the theory of determinable fees. In the states which convert an estate tail into a life estate with remainder in fee, the statute *De donis* is nullified and the issue in tail are deprived of their fee by allowing the first taker to alienate. If the land passes to the heirs, only the issue in tail, the heirs of the body, can take, yet for the purposes of alienation the first taker obtains the fee simple absolute. The first taker's estate for purposes of alienation is a fee simple, for purposes of descent is a fee tail. In both cases the character of the estate is altered at the moment of its devolution.

The best commentary upon these cases is the straits in which the Illinois court was placed by a limitation over of this character.[1] A testator devised land to his daughter for life, remainder in fee to her children and their issue, but if she died without issue, remainder over to his sons. He conveyed to the sons the residue of his estate. The daughter was well along in years, she had been married for many years, and there was no probability of issue. The land was valuable, but was unproductive. The brothers were anxious to assist by conveying all their estate to the sister. It could be made productive by a building mortgage. The court under its decisions should have held this to be not a fee tail in the daughter (for in that case the contingent remainder in the children created by statute is indestructible[2]), but a life estate in the daughter, contingent remainder in fee in the unborn issue, contingent remainder in fee to the brothers.[3] The reversion of the testator had passed to the brothers in the residue of the estate.[4] The sister by a conveyance in fee to her brothers would have destroyed the contingent remainder in her unborn issue,[5] the contingent remainders to the brothers and the vested reversion uniting in the brothers, their conveyance to her in fee would have given her a fee simple absolute. The opinion does not disclose what the court thought about the matter, except that it is said that the daughter had a life estate and the children a contingent remainder. The above obvious solution seems not to have been suggested, and

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[1] Gavin *v.* Curtis, 171 Ill. 640.

[2] Frazer *v.* Peoria Co. Supervisors, 74 Ill. 282.

[3] If this second remainder was vested as said in Boatman *v.* Boatman, *supra*, and Chapin *v.* Nott, *supra*, the contingent fee in the children was destroyed, or rather it never existed.

[4] See Gray, Rule against Perp. 113 a, where the case of Egerton *v.* Massey, 3 C. B. N. S. 338, is explained.

[5] Fearne, Cont. Rem. 322, 323; Frazer *v.* Peoria Co. Supervisors, 74 Ill. 282.

the court was driven to the unique proceeding of entertaining a bill in equity against the unborn issue and of appointing a trustee for them, as well as for the daughter and the brothers, with power to mortgage.

The conclusion to be deduced from all the cases herein is that in not one of them could the existence of a determinable fee properly so called, necessarily arise. In every one of them except the Massachusetts case, it is perfectly apparent that the court did not take into consideration the nature of a determinable fee.

It is, perhaps, needless to say that a true determinable fee is wholly unnecessary. Either the estate given should be considered a fee upon condition over which the law retains a control by controlling the right of entry, or the limitation ought to be considered as illegal. The instances of limitations upon failure of issue ought never to have been called determinable fees. If an estate tail be converted by statute into a fee simple, the creation of a determinable fee is nothing more than an attempt to nullify the statute and to give to the first taker of an estate tail a smaller estate than the statute gives him; but if the estate tail be converted by statute into a life estate in the first taker with remainder in fee to the issue in tail, the creation of the determinable fee is also an attempt to nullify the statute and to give to the first taker a larger estate than the statute gives him. The subject presents a curious study in the treatment accorded to statutes by the varying views of different courts.

John Maxcy Zane.

CHICAGO, ILLINOIS.

THE LIMITATION OF THE RIGHT OF APPEAL IN CRIMINAL CASES.

SHOULD the right of a man convicted of crime to have his case reviewed by a higher court be limited, and if so to what extent? The practice prevalent in this country is to allow such appeal in all instances as a matter of right, and to give the appellate court practically unlimited scope in its review. The limitation of the right which is now commonly proposed and which is suggested by the English system, is to confine the appeal to cases where the trial judge, in his discretion, reserves for review by the higher court some question of law which he considers doubtful and has decided adversely to the defendant.

The reasons urged for continuing the system of unlimited appeal are obvious and cogent. They run along two lines: first, by appeal, errors and injustice committed by the trial court may be corrected; second, through fear of appeal prosecuting attorneys and judges are made more careful to avoid error. Our sense of justice is so highly developed and our imagination so keen to depict the horrors of unjust incarceration that, as a people, we are eager to leave open to the accused every opportunity to establish a reasonable doubt as to his guilt. We consider it so possible that any judge may, on occasions, whether through error, prejudice, or ignorance, fail to give a fair trial, that we want the court's action open to the test of review before any man is irrevocably sent to jail. We so dread the consequences that might arise from cutting off the right of appeal, that the minds of most of us are not open to the suggestion.

Yet the reasons which may be advanced in favor of limiting the right are strong. First, as a preliminary consideration, it is urged that there must be a final determination somewhere. Shall it rest with a body of judges schooled more in abstract law than in human nature, studying not the living witnesses but printed records; or with a jury of twelve common men who have the flesh and blood, the tones of the voice, the flinch of the liar, the steady eye of truth under their observation? For, although in theory the appellate

courts consider chiefly questions of law, in practice they are constantly passing on the issues of fact; and, after all, the problems of law they unravel have little to do with the fundamental question of guilt or innocence. Here is suggested the second reason, namely, that the criminal appeal in practice offers not so much an opportunity for the innocent to right their wrongs as a series of technical loopholes through some of which the guilty may escape. Thirdly, the opportunity of appeal is, in practice, possible only to the few who can afford it, and is therefore denied to the great majority of men convicted. Fourthly, the appeal results in long delay — and tardy determination of a criminal prosecution is not justice. Fifthly, the total effect of appeals, on account of the doors of escape thrown open thereby to the rich and closed to the poor, and on account of the long postponement in punishment which results from them, is to increase public disrespect for the processes and results of criminal law. And finally, there is a reason which is not familiar to those not intimately acquainted with criminal trials. Under our system the People have no right to appeal. No criminal judge need ever be reversed if only he will decide all questions in favor of the defendant. Almost all prosecuting officers know what it is to have a guilty man escape because the trial judge, with his eye on his own record, has not the courage of his convictions to decide a contested point against the defendant. Thus the right of appeal opens loopholes of escape not only in the higher court, but in the trial itself, through the fear of a judge lest he be reversed.

In all the arguments thus outlined on both sides, there is weight. So far as they go they are sound. The question, for one seeking a correct conclusion, is as to the relative weight to be given them. By the limitation of appeals some assurance of certainty would be sacrificed — as something of justice and celerity is now lost by allowing them as of right. On which side lies the balance?

The question cannot be answered without a resort to experience. The actual occurrences must be studied impartially by those so situated as to be able to observe them. To give the results of such a study of conditions in New York County is the aim of this article. That county is chosen because the writer's opportunity to observe has been limited to that place. The choice is justified because the criminal business there transacted is probably more extensive and varied than the total business of most of the states.

The first set of facts attracting attention concerns the relative numerical importance of the appeal with reference to the total of all cases of conviction. It will probably come as a surprise to most readers to learn that of about eleven thousand persons found guilty on charges of felony in the New York County courts during the five years, 1898 to 1902 inclusive, not quite nine men in a thousand have had the judgment against them passed upon by an appellate court. Only in two and one half cases in a thousand has the judgment been reversed.[1]

It is thus evident that in proportion to the total number of criminals brought to justice, the number of those who profit by the right of appeal is exceedingly small. Those who argue for the continuance of the unlimited right of appeal may urge this fact as showing that we have the safety valve with remarkably small loss: that the escape of three men in a thousand is a small price to pay for the preservation of the opportunity to have gross errors committed in a trial rectified.

On the other hand a study of the causes for the small number of appeals leads to a conclusion of very serious import. One who watches the cases as they run through the courts day by day, knows that the number of appeals is far from proportionate to the number of cases in which, to some degree of probability, error has been committed. Whether or not an appeal is taken depends very

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[1] The exact figures are interesting. The Court of General Sessions and the Criminal Term of the Supreme Court have exclusive jurisdiction of cases where indictments are found, that is, as a rule which in practice has rare exceptions, only in case of felonies. Petit larcenies, simple assaults, and almost all other misdemeanors are tried in the Court of Special Sessions. The figures here given, as in fact the whole discussion in this article, have no reference to cases coming up in Special Sessions.

During the five years, 1898 to 1902 inclusive, 11,011 indicted offenders were found guilty, 2,294 having been tried and convicted by juries, the rest having pleaded guilty. Of these judgments, 82 have as yet been reviewed by a higher court — five of which, having been affirmed in the Appellate Division, are still pending in the Court of Appeals. In addition there are thirteen other appeals pending which had not, on Jan. 1, 1904, yet been passed on by either of the higher courts. This does not include a somewhat lesser number of appeals in which notice was served, but which were abandoned.

Of the cases already decided on appeal, reversals have ultimately been secured in twenty-five. If we count in cases still pending on the first day of this year, and assume that they will be decided on the same ratio of affirmances to reversals as those disposed of, and exclude the appeals which were abandoned, we get the following results:

Percentage of appeals to persons found guilty,	.0086
Percentage of appeals to persons convicted by jury,	.041
Percentage of reversals to persons found guilty,	.0025
Percentage of reversals to persons convicted by jury,	.012

little on the chances of securing a reversal, very greatly on the ability of the convict to pay counsel fees. It costs to appeal. The expense of counsel fees is certain, and there is a large contingent cost in case of failure. A very small number of convicted persons can afford it. The figures showing the proportion of appeals come very close to showing the proportion of defendants who can afford to appeal. Thus we see that, with the exception of men indicted for murder in the first degree, where the state, in case of need, will bear the expense, the door of appeal is open to the rich man, closed to the poor. This very fact constitutes a glaring injustice. In practice the result of the right of criminal appeal is that there is one law for the rich, another for the poor.

Though, indeed, appeals be few, they so frequently occur in notorious cases that their effect on the public estimate of the administration of criminal justice is great. The esteem in which the actions of criminal courts are held is a matter of no small importance, for if punishment is to be a deterrent from crime it must be generally conceived to be swift, accurate, hard to escape, brooking no delay. Historically and in fact, the basis of criminal jurisprudence is the substitution of public punishment for private revenge. "Vengeance is mine," says the state, and the individual must allow his private grievance to be swallowed up in a theoretical injury to the people as a whole. If public justice is swift and true, the individual is content. If not, he becomes restive, anarchistic, prone to take the law into his own hands, ready in extreme cases to resort to lynch law. Consequently, if there be evils in connection with appeals, though numerically appeals are few, they are of great importance.

The first alleged evil concerns the delays incurred.

There is a general belief that justice in New York is tardy. Its slowness is almost proverbial. The facts, however, are in striking contrast with the popular notion. Careful records which have been kept by the District Attorney, during the year 1903, of the length of time required for the disposition of indictments where the defendant was kept in the City Prison and not released on bail, show a remarkable celerity in their determination. In a total of about three thousand of these prison cases the average lapse of time from the date of original arrest to final judgment, including the preliminary hearing before the magistrate, the presentation of the evidence to the Grand Jury, the finding of the indictment

and the final disposition, either by trial, plea of guilty, or discharge, was only eight days.[1]

The popular impression springs from over-emphasis of the flagrant cases. The average man knows that Molineux was acquitted of the murder of Mrs. Adams almost four years after her death; he does not know what the usual speed is. Some of these delays are due to slowness on the part of the District Attorney in bringing the case to trial. His excuse lies in the fact that he is overcrowded with somewhat more than four thousand felony cases in a year; and yet there can be no justification for such delays as sometimes occur. It is not with this cause, however, but with the delay resulting from appeals that we are here concerned.

The average amount of time which has been required, in cases arising during the five years here under discussion, to bring a judgment to a decision on review by the Appellate Division has been fourteen months. That is for cases already decided. The twelve pending cases average, in lapse of time between conviction and Jan. 1, 1904, thirty-one months. These bring the total average up to at least 16.7 months. The average time required to take a decision from the Appellate Division to the Court of Appeals, including pending cases, has been at least six and one half months. The average time required to reach a final decision on appeals in capital cases where the appeal is direct to the highest court, the Court of Appeals, has been fifteen months.

It requires no argument to show that such delay in the final determination of a criminal case is a great evil from the standpoint both of the prosecution and the defendant.

The harm of it becomes even more apparent when we consider the extreme cases. The longest capital case — that of People *v.* Molineux — required twenty months for disposition on appeal. Even worse conditions have been tolerated in the cases before the Appellate Division. In March of 1898 a man named Koerner was convicted of murder in the second degree and sentenced to imprisonment for life. In December, 1899, one Martin Regan was

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[1] Of course pleas of guilty lower the average. But a man seldom pleads guilty until sufficient evidence has been amassed by the prosecution to secure his conviction. The figures are for all prison cases, including murder cases.

Bail cases are disposed of more slowly. They compose about one fourth of the total. There are no figures available concerning them, but it is quite exceptional when they are not disposed of within three months. The effort is constantly made to try prison cases first.

convicted of the same offence and received a like sentence. Appeals in both cases are still pending, — one almost six years old, the other over four. In both cases motions made recently by the District Attorney to dismiss the appeal were denied. In January, 1897, two men, Valentine and Fender, were convicted of petit larceny under an indictment and were sentenced to six months each. They secured a stay. Seven years later the conviction was affirmed by the Appellate Division, and an appeal to the Court of Appeals is now pending. Naturally enough this case was heralded in the public press. Further examples are unnecessary. In all, during the five years in question, and not including the case last referred to, there were thirteen appeals which lasted over two years, of which five lasted over three years, one four years, and one over five.

In estimating the causes and effects of these delays it should be recollected that in New York a man convicted of crime may apply to any justice of the Supreme Court in the state, or to the trial judge, for what is known as a Certificate of Reasonable Doubt. The effect of this process is to stay the execution of sentence and in most instances to liberate the convict on bail pending appeal. In other words, if a single judge can be found anywhere in the state who can be persuaded that there is a reasonable doubt as to whether the conviction will stand on appeal, the defendant can get out on bail while awaiting action by the higher court. The certificate is granted on a reading of the record and argument of counsel, in some well-known instances on a very scant reading. Thus it not infrequently happens that the decision of a court presided over by a judge whose whole experience is in criminal law and whose whole attention for the time being was given to the case, is overruled and temporarily nullified by the decision on the record, made during odd moments, by a judge of no superior jurisdiction, whose business is entirely with civil actions, and who has had little or no experience in criminal law.

What are the results? In five years[1] there were fourteen reversals when stays were granted. In at least nineteen[2] cases where stays were granted the judgment of the trial court was affirmed. So that the percentage of cases in which the stay was justified is slightly less than forty-two and one half. That the granting of a

[1] Cases arising 1898–1902 inclusive.

[2] Possibly in a few more. The records are not such as to satisfy one of their entire accuracy on this point.

stay tends to protract the appeal is to be expected. Of the fourteen exceptional cases of delay which have been instanced, stays were granted in nine. The average duration of appeal in cases already decided has been six months longer in cases where there was a stay than where there was not. Sometimes when bail has been granted on a stay the defendant has failed to appear and bail was forfeited when the judgment was affirmed. This happened in three cases. One other result can best be indicated by example. Sam Park, the walking delegate, was sent to Sing Sing, convicted of extortion. In a few days he secured a stay and was released on bail. His release resulted in his conviction shortly after on another charge, and he went back to Sing Sing, where he is to-day. While out on bail, with his head close shaven, he led the parade on Labor Day through the streets of New York. The sight was ill calculated to increase public respect for the workings of the criminal law.

Here then, in the delays of appeal, and in the practice whereby convicts may go out on bail pending the delay, are found what must be admitted to be great evils. However, they are evils which are capable of some correction. On September 1, 1902, a law took effect in New York State requiring appeals in capital cases to be brought to a hearing within six months unless the time should be especially extended. The new rule has taken effect in three cases, reducing the average duration of appeal from fifteen to eight months. The shortest case on record during the five years under consideration had been eleven months. There seems to be no good reason why the present allowance of one year to appeal in other cases should not be cut down and the hearing forced to as prompt a determination as is now required in capital cases. The abolition of the Certificate of Reasonable Doubt would also tend to minimize delay and would do away with other abuses. It is at best an unnecessarily sentimental provision of law. Surely the privilege of having a hearing on his appeal within a few months is consideration enough to show a man who has been found guilty of crime by the unanimous verdict of twelve impartial men.

At best, however, some delay is inevitable under a system of appeals, and every such delay is to some degree an evil.

We now come to the most important and at the same time most difficult part of our investigation. What, as a matter of actual facts, of the contention that appeals set free guilty men on technical grounds rather than that they give the innocent a remedy for substantial injustice?

This must at best be largely a question of opinion. What is said here of course represents nothing more than the personal convictions of the writer.

The test which should be applied to the decisions in which new trials were granted in order to answer the question at issue, is based on the assumption that the juries were correct in their decisions on the facts before them, — an assumption, by the way, in which we have so much confidence that upon it thousands of men are yearly sent to jail and hundreds deprived of life. Assuming that the jury were right on the facts before them, was the reversal based on technical errors in the trial not affecting the vital question of guilt or innocence, or was it because of some substantial injustice?

A study of the decisions where reversals were had on cases arising during five years[1] shows that there are at least nine instances where it would probably be generally agreed that the new trial was granted in the interest of substantial justice. In two[2] the ground for reversal was that essential elements of the crime charged had not been proved in the People's case. It is not technical to hold that a man must have offended against what is the law ere he shall be imprisoned. In one instance[3] the defendant was convicted of larceny where it was held that the facts proved by the prosecution showed that there was no larceny, the relation being that of debtor and creditor. In three cases[4] corroborative evidence was lacking where the law on broad principles of common sense requires it. In the three other cases[5] evidence offered by the defendant was excluded by the trial court when it should have been admitted, and might very possibly have proved facts in the defendant's favor which would have changed the verdict: surely an injustice which makes us heartily glad that the defendants had the right to appeal!

The other sixteen cases, in varying degree, seem to justify the general opinion that men get new trials — which usually means freedom — on technical grounds, or for reasons based on an entire lack of confidence in the jury system.

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[1] 1898–1902.

[2] People *v.* Whiteman, 72 N. Y. App. Div. 90; People *v.* Hochstim, 76 N. Y. App. Div. 25.

[3] People *v.* Thomas, 83 N. Y. App. Div. 226.

[4] People *v.* Gralleranzo, 54 N. Y. App. Div. 360; People *v.* Deschessere, 69 N. Y. App. Div. 217; People *v.* Miller, 70 N. Y. App. Div. 592.

[5] People *v.* Seldner, 62 N. Y. App. Div. 357; People *v.* Cahill, 62 N. Y. App. Div. 612; People *v.* Bahr, 74 N. Y. App. Div. 117.

Three[1] of these reversals were for violations of the hearsay rule. In all of them the evidence improperly admitted had some probative value, though slight, and in all it may well be contended that if the jury are to be trusted at all as weighers of evidence they could be trusted to have discounted the hearsay so that it could have done no substantial injustice. The case in which the violation of the hearsay rule was most flagrant will suffice for illustration. The defendant[2] was indicted with others for murder. Shortly after his arrest a confession by one of his accomplices implicating the defendant was read to him, he being at the time under instructions from the police officer to say nothing. Evidence was admitted concerning this incident, including the contents of the confession. As an accusation made in defendant's presence is admissible only to show what answer he makes and as here the defendant was instructed not to answer and did not, the contents of the confession were purely hearsay and inadmissible. But what of substantial justice? In a dissenting opinion Judge Hatch makes the following comments: "No one, we think, can read this record without reaching the conclusion that the defendant was guilty." "No member of this court has a reasonable doubt of the guilt of this defendant." "The crime proved was most heinous in character, and failure to punish it would constitute a gross miscarriage of justice." "In the present case it can be safely said that the jury would have reached a like result if this statement had been entirely stricken from consideration by them." In which conclusion Judge Hatch has since been justified. Through great efforts on the part of an unusually energetic prosecutor the evidence was again collected, and without the objectionable testimony the defendant was again convicted.

Two cases were reversed because evidence was introduced of prior crimes. In one[3] the witness who gave the objectionable testimony made such a bad impression that the case against the defendant was in fact hurt rather than helped by his appearance. Of course the Appellate Division could not know this fact from the printed record. The other was the Molineux case.[4] Here the chief ground of reversal was the admission of evidence concerning

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[1] People *v.* Kennedy (Murder 1st), 164 N. Y. 449; People *v.* Young (Murder 2d), 72 N. Y. App. Div. 9; People *v.* Bissert, 71 N. Y. App. Div. 118.

[2] People *v.* Young, *supra.*

[3] People *v.* Romano, 84 N. Y. App. Div. 318.

[4] 168 N. Y. 264.

a prior alleged murder, introduced on the theory that it tended to identify the defendant as the perpetrator of the crime charged in the indictment. By a vote of four to three the Court of Appeals held this evidence improper — not as lacking in logical relevancy, but as being introduced in violation of a rule of law. Later, tried with this evidence ruled out, Molineux was acquitted.

In three cases the reversal was because the higher court thought that the charge of the trial judge, while not incorrect, might have misled the jury. In two[1] of these the counsel for the defendants, who were present and alert to the impression being made by the living words, raised no objection at the time. It was left for the court above to find in the printed record a way out of the conviction. In the third[2] there was, as additional ground, a fear lest the failure to allow a question on redirect examination of one of defendant's witnesses might have caused a misapprehension. Of this case, Chief Justice Parker, in dissenting, remarks that the court was agreed, not only that the verdict was not against the weight of evidence, but thought that it was strongly supported by it. Another case,[3] akin to these, was where the conviction was of a police officer for neglect of duty. The main ground of reversal was that the charge of the trial court, while not incorrect so far as it went, was not sufficiently specific as to the defendant's duties in the premises. It is indicated in the opinion that the evidence was amply sufficient to have warranted a conviction had the charge been proper. Of course, whether or not the lack of definiteness in the charge affected the jury improperly, is a matter of pure guesswork.

In one case[4] a notorious forger, an ex-convict, was found guilty mainly on the testimony of two accomplices. Under the law, as it exists, they were held incompetent to corroborate one another. In another case[5] where corroboration was necessary it was amply produced, but some evidence introduced for the purposes of corroboration failed to prove anything. It was not stricken out, hence the reversal. If it had had any probative force it would have been admissible ; not having it, it is hard to see how failure to strike it out substantially injured the defendant. In another case[6] the de-

[1] People *v.* Schlesinger, 70 N. Y. App. Div. 199; People *v.* Cantor, 71 N. Y. App. Div. 185.

[2] People *v.* Zigouras, 163 N. Y. 250.

[3] People *v.* Glennon, 175 N. Y. 45.

[4] People *v.* O'Farrel, 175 N. Y. 323.

[5] People *v.* Swasey, 77 N. Y. App. Div. 185.

[6] People *v.* Wagner, 71 N. Y. App. Div. 399.

fendant was convicted of arson for setting fire to a building. Technical proof that the fire was of incendiary origin was carelessly omitted. This reversal may have been in the interests of substantial justice; at the same time one would think that if the testimony was sufficient to convince twelve men beyond a reasonable doubt that the defendant had set fire to the building, it must have been sufficient to justify the inference that the building was set fire to by some one. Fortunately, it was not hard to get together the witnesses on the second trial, the missing evidence was introduced, and the defendant again convicted, after the waste of much time and money.

In the four remaining cases the reversal seems to have been based on the fact that the Appellate Division did not agree with the jury in its decision on conflicting testimony. In two[1] this is avowedly the case. In two others[2] the ostensible reason for reversing was the refusal of the trial judge in the one case and failure in the other to charge that the failure of the prosecution to place in evidence a certificate of birth from a foreign country shown to be within the jurisdiction, could be considered by the jury as weighing against the People in the issue before them as to a girl's age. In both cases there was nothing to show that the certificates were properly certified so as to be admissible, and it is probable that if they had been introduced in evidence it would have been reversible error. Of one of these decisions Van Brunt, C. J., in dissenting, says:[3] "It seems to me that the reversal in this case is based upon the heavy sentence which was imposed and not upon any error contained in the record." Of these four cases it may be remarked that if there be anything in the theory that the bearing of a witness is of value in determining the weight of his testimony — and our jurisprudence is based on that theory — then the reversal of a verdict by an appellate court merely because their study of the record leads them to a different conclusion from what the jury reached as a result of seeing and hearing the witnesses, is not in the interests of justice. The jury, in a word, are more trustworthy than the higher court, on questions of fact.

It will be noticed that in the foregoing review of cases reversals

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[1] People *v.* Feldman, 77 N. Y. App. Div. 639; People *v.* O'Brien, 48 N. Y. App. Div. 66.

[2] People *v.* Ragone, 54 N. Y. App. Div. 498; People *v.* Dickerson, 58 N. Y. App. Div. 202.

[3] People *v.* Dickerson, *supra.*

on the ground of violations of the hearsay rule and the rule forbidding evidence of former crimes, have been classed as technical. The reason for this will appear more fully later. It is due to no lack of belief in those rules as, on the whole, invaluable guiding principles in the conduct of trials, but to the conviction that the error committed in allowing such evidence had no practical effect on the verdict of the jury that was substantially unjust to the defendant.

We have thus ascertained that there is basis in fact for the assertions that appeals have caused intolerable delay, that they have offered more technical loopholes for the guilty than opportunities for the innocent to correct substantial injustice, and that these opportunities and loopholes are open to the rich and closed to the poor. Serious as is the indictment against the present system of appeal which can be drawn upon these facts, we still are not convinced that the right of appeal should be cut off when we consider that, as we have likewise found, some instances have occurred where grave injustice would have been done had the right not existed. One man, unjustly convicted, is of more moment than many guilty escaping through technicalities.

The review of the reversals, however, suggests a way by which the right of appeal may be greatly limited without going so far as to run the risk of committing substantial injustice. The fundamental theory upon which the suggestion about to be made is based, is that juries can be trusted. Our whole system is based on that theory, yet we have been far from consistent in following it. There are certain errors which may be committed in the conduct of a trial which, if juries are trustworthy, we can trust the jury to correct. There are other errors which the jury cannot be supposed to correct. The present suggestion, in a word, is to limit the right of appeal to cases where error of the second sort is committed.

To specify: There is little or no danger of substantial injustice from the erroneous introduction of inadmissible testimony on behalf of the prosecution. Evidence is inadmissible on one of two grounds: either, first, because it has no logical relevancy, or, second, because, though logically probative, it is barred by some positive rule of law. Evidence of the first class is barred to save time: — it is absurd to reverse and have a new trial because of its admission. The second ground of exclusion is in reality technical because not based on principles of reasoning but on considera-

tions — good ones — of practice. Take, for instance, the two most striking examples. First, hearsay evidence, which is barred because not sanctified by oath or purified by cross examination. Logically it sometimes has value, usually very little. Suppose that some of it slips in. Under our present system we at once assume that the twelve men whom we trust with weighing all the other evidence, are incapable of properly discounting and weighing this testimony. No attack is intended on the rule. The only contention is that juries are so well acquainted with the general principle regarding hearsay evidence, that they will not give to any that is erroneously admitted any more weight at the most than it logically deserves. In so far as it has logical probative force, its consideration is a technical, and not substantial, wrong to the defendant. As a second example, evidence of former crimes is in most instances excluded. It certainly is conceded to have great logical relevancy. When a judge violates the rule and admits such evidence, is the defendant treated unjustly from a substantial and moral standpoint? Surely no one judging the defendant outside of the jury box, would be satisfied in his own conscience with his verdict did he not give due consideration to such evidence. In fact, logic is violated in favor of the defendant by enforcing the rule. Its occasional violation, therefore, works no substantial wrong.

No risk would be run in making it impossible to appeal on the ground that the verdict was against the weight of evidence because the jury is a more reliable tribunal than a higher court, so far as the facts are concerned. As for errors in judges' charges it is doubtful if, in cases where the testimony is *prima facie* sufficient to prove the crime, a verdict is ever unjustly influenced by such error. Juries do not convict unless they are convinced of moral guilt, and if the facts testified to make out a *prima facie* case of legal guilt, no wrong has been done by the verdict. So, too, any misconduct of the prosecuting attorney is more quickly detected and resented by the jury than by any higher court.

In two instances, however, error does substantial injustice which cannot be corrected by the jury. These are, first, where the uncontradicted evidence for the People does not prove a crime under the law. The conviction in such a case indicates the jury's belief that the acts charged as a crime were done by the defendant — the jury is bound by the court's ruling that those acts constitute a crime against the law. The second case is where a defendant is wrongfully prevented from introducing evidence in his own behalf.

He has not been given a fair chance to present his side of the case, and the jury are bound to consider only what he has introduced, and so cannot correct the error.

Thus we come to the suggestion that appeals from convictions be limited to cases —

1. Where it is claimed that the evidence submitted by the prosecution does not establish the crime *prima facie.*

2. Where it is claimed that material evidence offered by the defendant has been improperly excluded.

3. Where the trial judge reserves some question of law which he considers doubtful and of importance.

By so limiting the appeal most of the technical loopholes for escape would be closed and the number of appeals would be reduced. At the same time opportunity would be left to remedy any substantial injustice that is at all likely to occur. If some provision could be devised whereby in the third class mentioned the state could be made to bear the whole cost of appeal in the case of poor defendants, the greatest injustice of the present system would almost entirely disappear.

Nathan A. Smyth.

SUICIDE AND THE LAW.[1]

CATO the Younger, who is probably the most illustrious of suicides, upon the eve of his act discoursed with much vehemence in justification of the right "to set himself at liberty." Cato's view has been assumed as self-evidently true by all nations and tribes that have not received a strong influence from Christianity. Shall a man not be permitted to do as he wills with his own? And what is more essentially his own than his life? In American constitutional law nothing is more jealously guarded than personal liberty. A sane person may not be imprisoned save for crime or coerced except in respects obviously necessary for the public weal. How then may the state assume to interfere with the most radical act of self-liberation? How, with any semblance of consistency, may one be deterred from abandoning a life of suffering or abject despair or hopeless ennui? Undoubtedly the logic of the situation is with Cato and the pagans to whom suicide itself never suggested any idea of turpitude, it being held immoral only if, and in so far as, some collateral feature, such as cowardice, characterized it. The sentiment against suicide which generally prevails among Christians and Mohammedans constitutes one of the most signal moral accomplishments of Christianity, or rather of the Christian church. It is nowhere condemned in the Bible, though it is expressly inhibited in the Koran, Mohammedanism having "on this as on many other points borrowed its teaching from the Christian church, and even intensified it." "The Christian theologians introduced into the sphere we are considering new elements both of terrorism and of persuasion, which have had a decisive influence upon the judgments of mankind. They carried their doctrine of the sanctity of human life to such a point that they maintained dogmatically that a man who destroys his own life has committed a crime similar both in kind and magnitude to that of an ordinary murderer, and they at the same time gave a new character to death by their doctrines concerning its penal nature and concerning the future destinies of the soul."[2] To the many illustrations given by Mr. Lecky of the

[1] Address delivered before the New York State Bar Association, January 20, 1904.

[2] Lecky's Hist. of European Morals, vol. 2, p. 45.

effectual inculcation by the church of its absolute policy there may be added the history of the Jesuits in North America, graphically narrated by Parkman. In their mission of converting the North American Indians many priests of that order were subjected to lingering death by unspeakable torture, which certainly, without the presence of the strongest kind of arbitrary scruples, would have led to numerous suicides. The anti-suicide sentiment generated by the Christian church very naturally was embodied in the English common law. Blackstone states the legal attitude as follows:

"The law of England wisely and religiously considers that no man hath a power to destroy life, but by commission from God, the author of it; and, as the suicide is guilty of a double offense, one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. . . . But now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune; on the former, by an ignominious burial in the highway, with a stake driven through his body; on the latter by a forfeiture of all his goods and chattels to the king; hoping that his care for either his own reputation or the welfare of his family would be some motive to restrain him from so desperate and wicked an act."[1]

Among the Romans the legend of the suicide of the matron Lucretia was considered to hold up a worthy ideal. Even under Christianity there was a strong tendency in the days of the early church to excuse, and thereby indirectly countenance, suicide by women in order to escape violation of their chastity. After giving several instances of this class, Mr. Lecky remarks: "Some Protestant controversialists have been scandalized, and some Catholic controversialists perplexed, by the undisguised admiration with which the early ecclesiastical writers narrate these histories. To those who have not suffered theological opinions to destroy all their natural sense of nobility it will need no defense." Noble, doubtless, these women were, according to the standard of their age, but not less noble and much more rational have been hundreds of women during late years who, suffering the most revolting outrage, have nevertheless realized that a person can be really

[1] 4 Bl. Com. c. 14.

disgraced only through her own act. The recent history of the offenses against women, especially by negroes, in this country discloses sane and creditable conceptions of self-respect in that few, if any, cases of suicide of victims have been reported.

Cato may be taken as the general type of suicides to escape mental suffering. His frame of mind is one that once, or oftener, during life suggests itself to a goodly proportion of humanity. The occasional suicides of children through fear of parental reprimand or punishment, the comparatively frequent suicides of youths of both sexes from unrequited love, the still more common suicides of middle-aged persons because of financial embarrassment, and, most pathetic of all, the by no means rare suicides of elderly persons who lay down the burden of their own lives, realizing that *ipso facto* they lift a burden from the lives of others — the limitless variety of cases of consummated suicide indicates that dalliance with the thought of self-destruction is well-nigh universal. In the vast majority of instances the apparent mountain of anguish would seem but a molehill of temporary embarrassment in the perspective of a long life. If the momentary impulse be resisted the unfortunate or discouraged one will have many years of average felicity in which to congratulate himself on his self-control. To the end of helping him bear the ills he has, a strong popular sentiment is of great efficacy. It is of public as well as personal advantage to have suicide in general regarded as immoral, cowardly, and disgraceful. The individual's attitude towards suicide, as towards all ethical matters, is largely influenced by the standards of his age and the moral atmosphere that surrounds him. General history has recorded many local and some quite extensive epidemics of suicide. It is certainly a proper function of the pulpit, the press — all the didactic agencies of the community — strenuously to maintain the Christian attitude and to discountenance the let-alone policy of Cato and the pagans.

In the present state of intelligence, however, no good can result from adherence to the dogma of the absolute sinfulness of suicide. It has already been shown that even the early church was unable to enforce its rigid policy against suicide to escape violation of chastity. A similar difficulty arose as to certain cases of voluntary martyrdom where Christian fanatics, with precisely the same spirit and motive of dervishes in the East at the present day, rushed upon certain death at the hands of their persecutors, or implored death from pagan judges in order to enter immediately

into the joys of paradise. The church found it impossible to stifle admiration for suicides of that class. There is just one condition which safely may be tolerated by public opinion as a justification of suicide. That condition is the most simple and primitive one — the one that has been recognized by all systems save the Christian church. If a person be facing certain death, which must be preceded by excruciating physical pain, his suicide may be viewed without reproach. The inducement to suicide in such cases has been largely obviated by modern medicine, whose anodynes are freely used to deaden suffering, often, incidentally at least, shortening life. In her entertaining book, "Boots and Saddles," Mrs. Custer tells of journeys she made through regions infested with hostile Indians, and says:

"I had been a subject of conversation among the officers, being the only woman who, as a rule, followed the regiment, and, without discussing it much in my presence, the universal understanding was that anyone having me in charge in an emergency where there was imminent danger of my capture should shoot me instantly. While I knew that I was defended by strong hands and brave hearts, the thought of the double danger always flashed into my mind when we were in jeopardy."

If she had been thus killed, or in the event of the officer in charge being disabled or captured had killed herself, to escape a lingering death at the stake, it would certainly have been a great boon to her, and the infection of her example would not have spread to persons who ought to continue the struggle of life though worsted for the time. But the line must be drawn with the avoiding of physical torture which is a prelude to certain death from causes outside the victim's will. If exceptions were allowed in favor of some forms of acute mental suffering, private judgment would speedily come to be asserted as against the general dissuadent sentiment and the paganistic attitude would be revived.

There has been much discussion whether, and how far, the law may legitimately take cognizance of suicide; and first may be considered one phase of the subject as to which there is strong need of legal intervention. Blackstone, as we have seen, characterizes suicide as a "peculiar species of felony," and considerable legal casuistry has been expended on the question whether suicide does, or does not, constitute murder. It is unnecessary to enter here into the technical arguments *pro* and *con;* suffice it to say that the strong consensus of English professional opinion is that suicide is

murder, and, therefore, that accessories and abettors are also guilty of the crime.[1] Owing, however, to a technical rule that accessories to any crime could not be tried before the principal, the former escaped.

This anomaly was obviated by a statute passed early in the reign of Victoria, so that now one who persuades or assists another to commit suicide may be convicted and punished as a principal in the second degree, or an accessory. In many of the states of the American Union the law upon abetting suicide is in most unsatisfactory condition; indeed, there is no law at all.

The criminal law had been a powerful engine of tyranny under George III and his predecessors. Next to the bugbear of the establishment of a monarchy, there was no subject that more strongly exercised the minds of the fathers than strictly circumscribing the domain of penal jurisprudence. The same spirit animated the judges in construing the laws, and there grew up a narrow, technical policy of legal administration which gave a criminal defendant the benefit of every possible quibble. This attitude is now slowly passing away, but even yet criminal defendants everywhere in this country have more than a fair chance of escape from legal toils. Most of the states have codified their criminal law, and some of them have provided that no one shall be punished for any act or omission unless the same is made a penal offence. Even where a positive clause to the effect is not inserted, courts have tended to hold that no act is a crime unless definitely declared to be one by statute. The courts of some states where the question has come up have refused to class suicide as murder, and, as there were no provisions specifically covering suicide, abettors and accessories have gone scot free. Those courts might easily have adopted the English view that suicide is murder, and as such comprehended by the statutes; and probably the principal motive for not doing so was the general policy of favoritism to criminal defendants.

There is, however, a deeper reason, which may practically justify such judicial attitude. A certain symmetry and consistency must be preserved in jurisprudence, and if suicide were murder, an attempt might have to be classed as an attempt to commit murder, and punishable as such. The Supreme Court of

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[1] See an article entitled "Is Suicide Murder?" by William E. Mikell, 3 Col. L. Rev. 380.

Illinois, in the recent case of Burnett *v.* People,[1] suggests a theory upon which an abettor of suicide may be held liable as a principal criminal.

The following language from the opinion is of general interest:

"The English common law, as applied to accessories before and at the fact, has become more a form than a substance under our law. From an early day we held that under our statute the accessory before and at the fact could be indicted as a principal (Baxter *v.* People, &c., 3 Gilman, 368), and in two cases where the question was directly presented we held that it was improper to indict an accessory simply as such, as was done at common law, but that he must be indicted as principal (Usselton *v.* People, &c., 149 Ill. 612, 36 N. E. Rep. 952; Fixmer *v.* People, &c., 153 Ill. 123, 38 N. E. Rep. 667). As to the crime of murder, we have applied the rule that he who acts by another acts by himself, and that the acts of the principal are the acts of the accessory, and that the latter may be charged with having done the acts himself, and may be indicted and punished accordingly (Spies *v.* People, &c., 122 Ill. 1, 12 N. E. Rep. 865, 17 N. E. Rep. 898, 3 Am. St. Rep. 320). If a lunatic or an idiot, at the instigation or direction of another person, should commit a homicide, none would question but that the instigator and director in such case would be guilty of murder, although the principal could not be punished at all; and if A, by virtue of deceit or persuasion, induce B to kill himself, this is as much the act of A as though A had induced C to kill B. The charge in the second count of the indictment is that plaintiff in error did 'hire, persuade, and procure' the deceased to kill herself, and, if he did either of these, and as a result thereof deceased did kill herself, it was the act of plaintiff in error, and we have no hesitancy in pronouncing it murder if the element of malice is found."

The court — very properly, as it would seem from the printed report — reversed the conviction of murder, principally upon the ground that the evidence — consisting largely of admissions or confessions of the prisoner when he may have been mentally incapacitated from the effect of narcotics or stimulants — was insufficient. This Illinois case resembles on the facts the New York case of People *v.* Kent,[2] where a conviction of manslaughter in the first degree in abetting suicide, under the New York statute,[3] was held not to call for a certificate of reasonable doubt, the confessions of the prisoner, although he may have been under the influence of drugs, being competent and, with the other evidence, adequate.

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[1] 68 N. E. Rep., 505.

[2] 41 Misc. 191.

[3] § 175, Penal Code.

The Illinois case makes use of something analogous to the theory of agency in the civil law, in order to hold an abettor of suicide a principal criminal. The court cites, and to an extent relies upon, the case of Blackburn *v.* Ohio,[1] where the same theory of guilt was implied. In the Ohio case, however, while it was held that the act of the suicide in swallowing poison in the presence of the defendant "and by his direction was his act of administering it," it expressly appeared that there was evidence "tending to show that the defendant, by threats, forced the woman to take the poison."

In contradistinction to these cases there is the comparatively recent utterance of the Court of Criminal Appeals of Texas in Grace *v.* State,[2] as follows:

"Whatever may have been the law in England, or whatever that law may be now with reference to suicides, and the punishment of persons connected with the suicide, by furnishing the means or other agencies, it does not obtain in Texas. So far as the law is concerned, the suicide is innocent; therefore, the party who furnishes the means to the suicide must also be innocent of violating the law. We have no statute denouncing suicidal acts; nor does our law denounce a punishment against those who furnish a suicide with the means by which the suicide takes his own life."

The action of the Illinois court in invoking the doctrine of agency is, of course, commendable in order not to suffer one who may be potentially a murderer to escape; but it is highly probable that other courts besides those of Texas will not see the way clear to adopt such an expedient. Moreover, a very considerable degree of positive and personal participation in the act of suicide would probably be required in order to sustain a conviction upon the theory that the defendant was the initiator of and morally responsible for the homicide committed through the agency of his victim. In Blackburn *v.* Ohio, as above shown, there was evidence that the defendant forced the suicide to take the poison by threats. Under the New York statute,[3] on the other hand, such a strong case on the facts would not be required, a person being guilty of manslaughter in the first degree "who willfully, in any manner, advises, encourages, abets, or assists another person in taking the latter's life." It is doubtful whether the doctrine of the Illinois case could be stretched to cover instances where the project of suicide originated with the suicide himself, and the abettor went no further than to encourage and assist.

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[1] 23 Oh. St. 146. [2] 69 S. W. Rep. 529. [3] *Supra.*

The states of New York and Missouri have dealt with the situation in a very direct and efficacious manner. Statutes have been passed making the abetting of suicide and the abetting of attempts at suicide independent crimes, punishable by severe penalties. Under the New York statute, which ranks abetting of suicide as manslaughter, a man who had abetted the suicide of a woman was recently convicted in Rochester and sentenced to twenty years' imprisonment.[1] Abetting unsuccessful attempts at suicide is naturally more leniently punishable, but the policy which renders such an abettor also liable to substantial penalty is in accordance with common sense and justice. It is certainly a serious defect in the law if a person who wishes to get rid of another can with impunity encourage and assist him to make way with himself. Some technical criticism has been offered on the New York statutes on the score that abettors are treated as more serious criminals than principals. The very simple answer is that they are. It is perfectly legitimate to subject the abettor of an attempt to imprisonment not exceeding seven years, while the attempter himself may not be imprisoned for more than two years and generally escapes without any punishment at all. The acts of a suicide and his abettor are essentially different; the one is merely an attempt to be rid of life; the other is an attempt to profit by indirectly causing another's death. Whatever may be thought of the status of the principal's offense, an accessory to suicide is guilty of murder in all the moral blackness that that term connotes. It is to be hoped that the legislatures of other states will not be deterred by merely technical or academic objections from adopting from New York and Missouri a very important legal reform.

The question remains whether legal provisions directly affecting an unsuccessful suicide himself are justifiable and expedient. Several references have already been made to the portions of Mr. Lecky's work on European Morals treating of suicide, which are valuable alike for their collation of the literature of the subject and the author's own enlightened and judicial views. The present writer, nevertheless, feels constrained to except to Mr. Lecky's sweeping dismissal of legal interference. He says: "Suicide is indeed one of those acts which may be condemned by moralists as a sin, but which, in modern times, at least, cannot be regarded as within the legitimate sphere of law; for a society which accords to

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[1] See People *v.* Kent, *supra.*

its members perfect liberty of emigration cannot reasonably pronounce the simple renunciation of life to be an offense against itself." This is substantial Catonism, and the doctrine is not only in accord with the axioms of modern democracy, but is supported by the spirit of positive provisions of American constitutional law. It must not be overlooked, however, that much of the success of the English policy of government has been due to its very illogicality, its opportunism. America has inherited this policy and followed it even in the working of written constitutions.

The Federal constitution and the constitutions of the various states contain so-called bills of rights which safeguard individual liberty and private property in the broadest terms. Yet nothing is better settled than that these rights are not absolute, but merely relative; that they must yield to any legislation which the courts shall say is fairly to be considered for the public welfare. The nominal function under which the larger part of such legislation is upheld is the vague, confessedly indefinable "police power" of the state. This policy has been exercised and judicially sanctioned to such lengths during recent years that many conservatives are inclined to view the police power as the wooden horse of socialism.

The preservation of the public health — and under this may be included the prolongation of life and the prevention of death — is one of the most common spheres of exercise of the police power. Except in cases of suicidal paranoia, a form of mental disease distinctly recognized and classified by alienists, the liberty of a would-be suicide cannot be interfered with on the ground of insanity. Some writers, and even a few judges, have ventured the opinion that suicide is itself presumptive proof of insanity, an assumption abundantly refuted by every-day observation. Nevertheless, the present writer is of opinion that, as guardian of public health and life, and upon grounds analogous to those applied in controlling insane persons, the state may legitimately take temporary custody of persons with suicidal intent. If the majority of suicides were committed by people who were in normal mental and physical conditions and after mature deliberation, it would be difficult to answer Mr. Lecky's reasoning. As matter of fact suicide is usually the result of impulse, of temporary remorse, or discouragement. History furnishes numerous examples of men and women who, having unsuccessfully attempted suicide, have thereafter lived long and useful lives. Similar instances among persons not sufficiently important to get into history have probably been countless.

Under these considerations the state may well step in and save the would-be suicide from himself while the impulse lasts. Such course may be constitutionally illogical, but it is thoroughly practical, eminently salutary. If physical disease, or financial distress, or fear of disgrace has precipitated an attempt at suicide, medical treatment, or charitable aid, or the sympathy and encouragement of friends may reconcile the unfortunate to facing life again. It may be of very substantial utility to have authority forcibly to restrain him from repeating his attempt until after these outside influences shall have been brought to bear, and the normal love of life shall have had opportunity to reassert itself.

The state of New York has a statute which makes an attempt at suicide a crime punishable by imprisonment not exceeding two years, or by a fine not exceeding $1,000, or both.[1] The specific policy of this law is wrong. Public opinion is against it and it has proved unenforceable. During the year 1902 twenty-one cases, and during the first half of 1903, nine cases of attempted suicide were held for the grand jury by magistrates in the Boroughs of Manhattan and the Bronx of the City of New York. In every case the grand jury refused to find an indictment and the proceeding was dismissed. Such action was entirely satisfactory. The contention of Cato and Mr. Lecky is certainly valid to the extent that one who attempts suicide should not be treated as a criminal. The modern theory of penal legislation is prevention of future crime from which the factor of revenge is eliminated. It is quite plain that punishing an attempter would not deter others from making similar attempts; it would not even tend to discourage a second attempt by the same person. On the other hand, legislation touching would-be suicides would not, as has sometimes been semi-seriously suggested, tend to induce attempters to make assurance doubly sure. Criminal penalties might discourage spurious attempts at suicide for the sake of theatrical or sympathetic effect, but a person really resolved on taking his life would scarcely pause to consider his liability to fine or imprisonment if his plan should fail. Laws should be passed aiming to accomplish merely what probably has been accomplished in many cases by the existing law of New York in spite of its anomalous form. One who attempts suicide should be classed not as a criminal, but as an unfortunate person amenable to temporary deprivation of liberty.

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[1] §§ 174, 175, Penal Code.

He should be made subject to restraint in the discretion of a magistrate not exceeding a brief, definite period. Even extreme advocates of the view of Cato and Mr. Lecky ought to be reconciled to legislation of such limited scope, which probably would be instrumental in saving many lives, because the way can never be closed, even though it be temporarily blocked, against one who is calmly determined upon quitting the world.

Wilbur Larremore.

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LIMITATIONS ON THE "ACCEPTANCE ON MAILING" THEORY. — All jurisdictions, except possibly Massachusetts,[1] hold that a letter accepting an offer completes the contract when mailed.[2] Although it has been held that this doctrine depends on the irrevocable character of the act of mailing,[3] the change in the United States postal regulations which allows letters to be reclaimed until delivered[4] has made no difference in the decisions,[5] and whether logical or not the general existence of the rule must be admitted. Its operation extends even to cases where the letter is never delivered.[6] Yet, on examination, it would seem to have certain necessary restrictions.

In the first place the acceptance, in order to take effect when mailed, should be properly stamped and addressed. For, even if we adopt the theory that the post-office is the agent of the offerer[7] — a theory which is hardly borne out by the facts — mailing a letter not adequately prepared for transmission can scarcely be considered such a delivery as would bind the principal. And the more satisfactory theory, which throws the uncer-

[1] McCulloch *v.* Eagle Ins. Co., 1 Pick. (Mass.) 278: but see Bishop *v.* Eaton, 161 Mass. 496.

[2] Tayloe *v.* Merchants Fire Ins. Co., 9 How. (U. S.) 390; Henthorn *v.* Fraser, [1892] 2 Ch. 27.

[3] *Ex parte* Cote, L. R. 9 Ch. App. 27.

[4] Postal Laws and Regulations, 1893, §§ 487, 488, 489.

[5] McDonald *v.* Chemical Nat. Bk., 174 U. S. 610, 620; Hartford, etc., Ins. Co. *v.* Lasher Stocking Co., 66 Vt. 439; Bishop *v.* Eaton, *supra.*

[6] Duncan *v.* Topham, 8 C. B. 225; Household, etc., Co. *v.* Grant, 4 Ex. D. 216; White *v.* Corlies, 46 N. Y. 467.

[7] Household, etc., Co. *v.* Grant, *supra;* Hartford, etc., Ins. Co. *v.* Lasher Stocking Co., *supra.*

tainty on the offerer as the one who took the first step, and holds that when the acceptor has done all that he ought to do, he may consider the contract complete, certainly does not apply where the acceptor has been negligent. No man by his negligence should be allowed to throw a risk upon another without his consent. The test in such cases, therefore, would seem to be that if there is any risk of delay at the time the letter is mailed, caused by the negligence of the acceptor, the acceptance should not take effect until received.[8] Very slight errors, as in penmanship or spelling, should not be fatal unless dangerous. The risk alone should be the test, and subsequent delay or prompt delivery should be important only as evidence of that. For if there is danger of delay on account of misdirection, and the acceptance will not complete the contract at the time it is mailed, it would hardly be logical to contend that a merely fortuitously prompt delivery would relate back, and change the original character of the act.[9]

There is a second way in which the acceptor might throw risk upon the offerer without authorization. Although his situation is not ordinarily changed by unusual delays in the transmission of the mails,[10] yet, if, knowing beforehand of an existing danger of such delays, he nevertheless uses the mails, he cannot claim the protection of an authorization for such action implied when the mails were regular. Unless the offerer, by himself knowingly using the mail under these extraordinary conditions, has given implied permission to the acceptor to do the same, no such implied permission exists. Here, then, is another limitation to this doctrine, since it is always based upon some sort of authorization. During the Transvaal war, the holder of an option to buy certain land mailed three letters of acceptance before the expiration of that option. As, owing to the war, there was no regular postal communication, only one letter was delivered, and that after the option had expired. It was held that the acceptance did not take effect when mailed. *Bal* v. *van Staden*, 20 So. Afric. L. J. 407. The decision is doubtless sound. The acceptor ought not to be allowed knowingly to throw any risk upon the offerer which the latter has not, at least by implication, agreed to accept. The same principle applies as in the case of his negligence. Whenever at the time the acceptor mails the letter he knows that he is incurring an unauthorized risk, or whenever at that time his negligence has occasioned such a risk, the acceptance should not take effect until received.

LIABILITY OF MUNICIPAL CORPORATIONS FOR SERVICES PERFORMED UNDER VOID CONTRACTS. — By an action in quasi-contract one who does work under a contract supposedly valid, but actually invalid, can generally recover the value of the benefits conferred by his services.[1] Where, however, services are so rendered for a municipal corporation other considerations become important. Often there are statutes expressly prohibiting recovery. Where there are no such statutes the question has frequently arisen and the cases have been divided into two classes: first, where the services

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[8] Blake *v.* Hamburg, etc., Ins. Co., 67 Tex. 160; Potts *v.* Whitehead, 20 N. J. Eq. 55. *Contra*, Schultz *v.* Phenix Ins. Co., 77 Fed. Rep. 375.

[9] But see McCulloch *v.* Eagle Ins. Co., *supra*.

[10] Dunlop *v.* Higgins, 1 H. L. Cas. 381.

[1] Van Deusen *v.* Blum, 18 Pick. (Mass.) 229.

are rendered under a contract *ultra vires* in its nature; second, where the services are rendered under a contract void because of noncompliance with some technical requirement either of the general law or the corporation's charter. A third class is suggested by a recent case in which recovery was allowed for services rendered under a contract made for the corporation by an agent who had no authority. *City of Chicago* v. *McKechney*, 68 N. E. Rep. 954 (Ill.).

In the first class of cases, services performed under an *ultra vires* contract, recovery in quasi-contract is allowed only where it will impose no burden on the taxpayers; where in effect recovery is merely to return what the corporation has received. For example, recovery was allowed of money paid to a town on a void contract for the sale of a fishery.[2] This, it is submitted, is the correct rule. If what has been received can be returned, it must be paid for when not returned. So also if it has been applied to legitimate corporate purposes, it must be paid for. In other cases, however, there should be no liability. To allow recovery would be to allow the corporate officials to indirectly impose a burden on the taxpayers which the law has directly forbidden, and would open the door to extensive frauds on the public.

Where work is done under a contract void because of some technicality and not in its substance *ultra vires*, it seems clear that there should be a remedy in quasi-contract for the reasonable value of the benefits conferred. An individual who has procured services by means of a contract of this sort, invalid, for instance, because of noncompliance with the Statute of Frauds, is liable for their value in quasi-contract.[3] A corporation in such cases should stand in the same position as an individual. The services have been requested and received. They are services for which the corporation had a right to contract, and it is held for no more than the benefit received. A more obvious case for quasi-contract can hardly be imagined. The courts, however, in such cases are not unanimous. Recovery is generally made to turn on the nature of the technical defect.[4]

The courts, in opposition to the principal case, have generally held that where services are performed under a contract made for the corporation by an officer who had no authority, there can be no recovery.[5] It is said that to allow recovery in such cases would make possible extensive frauds on the public.[6] This objection, however, seems untenable, for the proper authorities have the power to make contracts for the same purpose and recovery is limited to the benefit conferred. There seems to be no reason for treating the corporation in such cases differently from an individual. Recovery may, however, be objectionable for other reasons. The services are not at the request of the corporation. Consequently on general principles of quasi-contracts there is no liability unless the corporation voluntarily keeps the benefits conferred.[7] So, unless the corporation, having the power to return, nevertheless retains the benefit of the services, it should incur no liability in this class of cases.

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[2] Dill *v.* Inhabitants of Wareham, 7 Met. (Mass.) 438.
[3] Cadman *v.* Markle, 76 Mich. 448; Montague *v.* Garnett, 3 Bush (Ky.) 297.
[4] McDonald *v.* Mayor, etc., New York, 68 N. Y. 23.
[5] Bonesteel *v.* Mayor, etc., New York, 22 N. Y. 162.
[6] Hague *v.* City of Philadelphia, 48 Pa. St. 527.
[7] Zottman *v.* San Francisco, 20 Cal. 96.

CONTRIBUTION AMONG WRONGDOERS. — Where several persons are jointly liable and one makes a payment discharging the liability of all, he generally gets a right to contribution against his co-obligors. It has commonly been said, however, that this is not true between wrongdoers. Yet to such a broad statement there are admittedly many exceptions, — so many in fact that some courts have been led to declare that it can no longer be stated as a general rule.[1] For example, it is well recognized that among those who are wrongdoers merely by construction of law there may be contribution. Thus, where under the doctrine of *respondeat superior* joint employers of a tortfeasor become liable for his acts, contribution is permitted if they are morally innocent.[2] The same is true where several parties under an honest mistake as to title levy upon property belonging apparently to their debtor.[3] Again, where recovery for a negligent tort is based upon failure to perform a duty imposed by a joint undertaking, the party paying all the damages may recover half from the other.[4] In one case at least this rule has been extended to negligent torts in general.[5]

Wherever contribution is enforced the right rests not on a presumed arrangement between the parties, but on a recognition that as between them it is just that the burden be borne by those who have shared the benefit.[6] In the above cases the obligation arises from the benefit received in the discharge of liability. Such a benefit exists wherever one joint tortfeasor discharges the liability of all. As between one wrongdoer and another, contribution is as equitable between wrongdoers as between any other joint obligors. Although this has been recognized in several cases,[7] there has been a widespread failure to do so. It is therefore gratifying to note the emphatic language recently used by the New York Court of Appeals in the case of *Kolb* v. *The National Surety Company*, 176 N. Y. 233. "The legal principle upon which contribution among those jointly indebted rests, is as just where wrongdoers are concerned as in other cases where it is allowed, and the refusal of a court to entertain an action to compel it is based upon considerations of the nature of the complainant's liability and the association of the parties who incurred it."

As just indicated, although contribution may be equitable, it does not follow that a court will entertain an action to enforce it. Where the conduct of the party asking relief was intentionally unlawful or morally wrong, the interests of the community demand as a measure of protection that the loss lie where the injured party has seen fit to place it.[8] Otherwise the joint commission of torts would be encouraged. Where, however, as in the cases above mentioned, there has been no joint undertaking to commit a tort and the parties have not been engaged in an act immoral or intentionally unlawful, contribution should properly be permitted. Public policy does not seem to require that one who is liable for a tort should never be able to shift the burden of his liability. This is the reasoning which leads to the enforcement of express contracts under such circumstances. Otherwise it

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[1] Goldsborough *v.* Darst, 9 Ill. App. 205; Bailey *v.* Bussing, 28 Conn. 455.
[2] Woolley *v.* Batte, 2 C. & P. 417; Horbach *v.* Elder, 18 Pa. St. 33.
[3] Acheson *v.* Miller, 2 Oh. St. 203.
[4] Armstrong County *v.* Clarion County, 66 Pa. St. 218.
[5] Palmer *v.* Wick, etc., Co., [1894] A. C. 318. See Thweatt *v.* Jones, 1 Rand. (Va.) 328.
[6] Dering *v.* Earl of Winchelsea, 1 Cox 318.
[7] Sely *v.* Unna, 6 Wall. (U. S.) 327.
[8] See 12 HARV. L. REV. 176.

would be impossible to enforce bonds of indemnity or the innumerable contracts of employers insuring against liability for the negligence of their employees. The line which is drawn in such cases would seem to afford a practical test. Where such a contract would be valid, contribution should be enforced. But if under the circumstances a contract to share liability would be regarded as against public policy, an exception should be made to the general rule of contribution.

PRESCRIPTION IN INTERNATIONAL LAW. — A question that finds little discussion in decided cases or arbitrations is whether one sovereign state can acquire the territory of another by prescription. Nevertheless, the great majority of writers on international law,[1] a number of international arbitrations,[2] and at least three cases in the United States Supreme Court[3] have recognized the existence of an international doctrine of prescription.

It has, however, been contended that a doctrine of international prescription is inconsistent with the principle, "*nullum tempus occurrit regi.*"[4] A satisfactory answer would seem to be that this principle applies only as between individuals and the sovereign. While a state may impose such a rule upon its subjects, as between conflicting sovereign states one state cannot of its own accord impose a limitation upon another that can be effectual where its sovereignty is disputed. It has also been objected that one of the necessary elements of municipal prescription is absent between nations — a tribunal to which controversies may be submitted by aggrieved claimants before the title by prescription accrues.[5] The answer is that if that element is necessary it will be found in the willingness of the nations to abide by international principles, just as in any other international controversy. To deny that such a controversy can find a mode of settlement is to deny that any international dispute can be legally settled; which is to undermine the whole theory of an international law.

The recognition of the doctrine of prescription between nations seems not unnatural in view of its universal application in the municipal law of the civilized countries of the world. Most of the reasons for the latter may be argued in favor of the former. Long exercise of sovereignty naturally affects in an important measure the territorial conditions. Private acquisition of property rights and habits of living accommodate themselves to the existing jurisdiction and a disturbance of those conditions would be subversive of innocent private interests. Lapse of time produces a maze of uncertainty as to actual territorial rights, and if extended user did not fix beyond question the multiform relations incident to sovereignty, repose would be sacrificed without a corresponding benefit. No reasonable settlement of rights could be reached after a lapse of years. The most imposing array of evidence means nothing, since it is quite probable that decisive counter evidence has been lost. It is for that reason that prescription should be deemed conclusive. To object that sovereign rights will thus be arbitrarily

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[1] See Creasy's First Platform of International Law, 250.

[2] Williams *v.* Venezuela, 4 Moore, Int. Arb. 4181; Mossman *v.* Mexico, *ibid.* 4180; Barberie *v.* Venezuela, *ibid.* 4199; see also the rule submitted to the British-Venezuelan Tribunal of Arbitration, 5 *ibid.* 5018 (a).

[3] Rhode Island *v.* Massachusetts, 4 How. (U. S.) 591, 638; Indiana *v.* Kentucky, 136 U. S. 479, 509; Virginia *v.* Tennessee, 148 U. S. 503, 52

[4] Indiana *v.* Kentucky, *supra*, 500.

[5] See Pomeroy, International Law 126.

destroyed is an unwarranted assumption, since those rights cannot reasonably be shown to exist. Whether the time in each case has been sufficient to establish title by prescription is a question which must be left to the judgment tribunal.

It would seem that the doctrine should apply with peculiar force in the United States, where one state may appeal to the Supreme Court of the United States to settle its controversies with other states.[6] A recent Wisconsin case, in relying upon the doctrine in determining a question of title to property between two individuals, seems, therefore, sound. *Franzini* v. *Layland*, 97 N. E. Rep. 499.

Criminal Liability of Negligent Directors. — Much judicial consideration has been given to the question of the liability for negligence in civil cases of a corporate director to the corporation or to strangers; but the decisions involving the important problem of his responsibility to the state for the consequences of his neglect are surprisingly few. The question assumes much practical importance under modern business conditions, and it has recently been forced into prominence by several lamentable accidents. The point was involved in a late New Jersey case which has aroused wide-spread public interest. *State* v. *Young*, 56 Atl. Rep. 471. Many lives having been lost in a street car accident, an indictment was framed against the directors of the company charging them with negligence in failing to provide adequate facilities for stopping the car on a slippery track. The court, finding no evidence of such negligence, directed a verdict, but stated that the duty required of directors was to provide a safe system for public travel. The basis of the criminal liability was not discussed.

Primarily, of course, it is the corporation which owes the duty to its patrons and to the state. Directors are mere agents of the corporation. The civil liability to a third person of an agent is held to depend on the distinction between non-feasance and misfeasance; for, while the duty to act affirmatively is owed only to the principal, the duty to refrain from positive misfeasance the agent owes to all the world.[1] But it would seem that the criminal responsibility of an agent ought not to involve this technical and often troublesome distinction. By the better view the negligent omission of a legal duty, to whomsoever owed, may render the negligent person liable to indictment for homicide.[2] If this position be correct, the negligent director is criminally liable whether his act be one of omission or of commission, for his duty to the corporation requires him to abstain from negligent acts of either kind.

The degree of care which may properly be required of a director varies with the nature of the corporate business. Towards the corporation it is ordinarily said to be that which a reasonably prudent man would exercise in his own business.[3] But to become indictable the negligence must be of a higher degree. It must be so gross as to be wicked; and the sounder

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[6] U. S. Const. Art. III. Sec. 2; Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657.

[1] Bell *v.* Josselyn, 3 Gray (Mass.) 309; Van Antwerp *v.* Linton, 89 Hun (N. Y.) 417, affirmed 157 N. Y. 716.

[2] R. *v.* Pitwood, 19 T. L. R. 37. See 16 Harv. L. Rev. 297.

[3] Briggs *v.* Spaulding, 141 U. S. 132.

though not the universal rule makes the standard not external, that of the average man, but internal, that of the defendant himself.[4] He must have "known better," or he is not deserving of punishment. That a railroad director was so ignorant that he did not appreciate the danger of existing conditions would, however, be insufficient to excuse him, since he would doubtless know that public safety demands careful and competent supervision of railroads, and that this supervision is part of the duty of the director. If, knowing this, he undertakes the responsibility of oversight while consciously unable to intelligently oversee, he cannot excuse himself on the ground of ignorance of the dangerous conditions. His position is analogous to that of a person who knowing his own incompetence undertakes to run a locomotive or to practise medicine.[5] The public welfare demands that those upon whom the people are so largely dependent be held to the highest legal responsibility.

THE IMMUNITY OF GOVERNMENT PROPERTY FROM ARREST. — Since the exhaustive and well-considered opinion in the case of Briggs *v.* The Light-Boats,[1] it has been well-established law that, speaking generally, no lien can be enforced against government property when the enforcement involves a disturbance of the government's possession. It may not be erroneous to say the lien exists; but where an attempt is made to enforce it, the courts meet a grave jurisdictional difficulty. To take property of the government out of its possession is a derogation of its sovereign rights. The few cases which have allowed the lien to be enforced seem to have overlooked this distinction between the existence of the lien and the enforcement of it.[2] When, however, the property sought to be arrested is not in the possession of the government, a different question arises on which the law is not so clear.

The Judicial Committee of the Privy Council has recently taken occasion to express an opinion on both these points. A ferry boat, the property of the Crown destined for service in the operation of a government railway, being disabled on the high seas, was towed into port. Their Lordships held she could not be libeled for salvage. And although they regarded the vessel as in the possession of the servants of the Crown, they expressly stated that their decision would not be affected if it were to be shown that she was in the hands of private persons. *Young* v. *Steamship Scotia*, 89 L. T. 374. It is submitted that this latter opinion is inconsistent both with authority and with principle. The property of the United States in the hands of a carrier has been subjected to a lien for freight,[3] likewise to a lien for salvage.[4] And in a much quoted opinion Mr. Justice Story held such property of the government liable to contribution for a general average loss.[5] It is probable, moreover, that such has always been the law in England.[6] There is one

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[4] R. *v.* Wagstaffe, 10 Cox C. C. 530. *Contra*, Commonwealth *v.* Pierce, 138 Mass. 165.

[5] R. *v.* Markuss, 4 Fost. & F. 356.

[1] 11 Allen (Mass.) 157.

[2] The Revenue Cutter No. 1, 21 Law Reporter, 281 (U. S. D. C.).

[3] Union Pacific Railroad Co. *v.* U. S., 2 Wyo. 170.

[4] The Schooner Merchant, 17 Fed. Cas. 35 (U. S. D. C.); The Davis, 10 Wall. (U. S.) 15.

[5] U. S. *v.* Wilder, 3 Sumn. (U. S. C. C.) 308.

[6] See 1 Parsons, Mar. Law 324.

case apparently *contra* to this general holding, where an inn-keeper was indicted for obstructing the passage of the mails by detaining the coach horses. He pleaded his innkeeper's lien, and it was held insufficient.[7] In this case, however, the indictment was under a statute which forbade absolutely any obstruction to the passage of the mails. The decision, therefore, seems not to modify the weight of authority. On principle, moreover, there seems no valid objection to the enforcement of the lien. It is one thing to say the courts may not take property out of the possession of the government; it is another and quite different thing to say that when the government submits to the processes of the courts in order to regain its property, the ordinary legal obligations with regard to that property must not be satisfied. In this latter case it is reasonable to say that the government by its appearance as a suitor waives its exemption and submits to the application of the same principles by which justice is administered between private suitors.[8]

Similar Occurrences as Evidence. — It is often important to determine the quality of a certain object or act, such as the value of land, the dangerous character of a drug, or the reasonableness of an act. To prove this, it is customary to bring forward other occurrences under more or less similar circumstances which throw light upon this quality. Speaking generally, such evidence is admissible unless in the opinion of the judge its probative value is outweighed by a resulting multiplicity of issue or undue surprise.[1] As a result of the vagueness of this rule, the decisions are chaotic and arbitrary. It would seem, however, that in certain cases distinctions might be drawn which would tend to simplify the question.

In considering whether evidence should be excluded on the ground of surprise, a distinction may be noted between the effects and operations, under similar circumstances, of the same object or act, and of a similar object or act. For example, to prove that a certain grading where the plaintiff had fallen was dangerous, evidence of other falls from the same grading, or from a similar grading in another city, might be offered. In the first case there should be no exclusion on the ground of surprise, since the nature of one particular thing only is brought in question, and both parties must have known that its own effects would probably be produced as evidence.[2] When, however, the operations or effects of other similar acts or objects are offered, the judge should be free to exclude them unless for some reason their introduction ought to have been anticipated.[3]

Unless the similar occurrences offered in evidence are numerous, they should not be excluded on the ground of multiplicity, for they can cause no great danger either of confusing the issue or unduly protracting the trial. And whenever the number of instances becomes so great that the judge might exclude them for that reason, that very fact would seem to make an opinion necessary and admissible through which these same instances might

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[7] U. S. *v.* Barney, 3 Hall's Am. L. Jour. 128 (U. S. D. C.).
[8] See The Siren, 7 Wall. (U. S.) 152, 159.

[1] Greenl. Ev., 16th ed., § 14 v.
[2] Hunt *v.* Lowell Gas Co., 8 Allen (Mass.) 169; Darling *v.* Westmoreland, 52 N. H. 401; District of Columbia *v.* Armes, 107 U. S. 519.
[3] Paine *v.* Boston, 4 Allen (Mass.) 168; Grand Trunk R. R. Co. *v.* Richardson, 91 U. S. 454.

be admitted indirectly. As a general rule opinion evidence is excluded only when superfluous.[4] If separate occurrences cannot be adequately presented to the jury, or if they are such that jurymen would not have the technical knowledge necessary to draw a correct inference, a witness better qualified to deal with the question may state his conclusion.[5] And as a general rule he is allowed to state the facts on which this conclusion is based.[6] This same reasoning applies also to individual conduct, where numerous occurrences under similar conditions constitute a custom.[7] In a late Wisconsin case, to prove the plaintiff's due care, evidence of the existence of a general railroad custom for switchmen in the yards to ride on the side of freight cars was admitted. *Boyce* v. *Wilbur Lumber Co.*, 97 N. W. Rep. 563. Clearly this could be admitted only as an opinion, for whether a custom exists is nothing but a conclusion of the witness from numerous individual instances within his knowledge, which he might have been allowed to state to show the reasons for that conclusion. Accordingly, whenever individual instances, otherwise admissible, are sought to be excluded on the ground that multiplicity prevents an adequate presentation to the jury, that very ground makes admissible an opinion which possesses all the probative value of separate occurrences and may be used to indirectly introduce the occurrences themselves.

COUNTERCLAIM AND THE JURISDICTIONAL LIMITS OF COURTS. — By a statute almost universal in the United States, the right is conferred on the defendant in any action at law to counterclaim any right he may have against the plaintiff and recover the amount that his claim exceeds the latter's. The broad language of these statutes raises an interesting question when the defendant's counterclaim is greater in amount than the jurisdictional limit of the court in which the plaintiff has brought his action. The courts in such cases have reached different results. A recent New York case holds that the court can take jurisdiction of the counterclaim and give judgment on the merits, though the amount far exceeds the jurisdictional limit of the court. *Howard Iron Works* v. *Buffalo, etc., Co.*, 176 N. Y. 1. Another view, held in South Carolina, is that by filing the counterclaim the defendant ousts the court of jurisdiction of the whole matter.[1] The majority of the courts, however, hold that in such cases the defendant cannot file his counterclaim, but must sue it out in the proper court as a separate action.[2]

A counterclaim is a separate cause of action, which the defendant is authorized to litigate in the same action with the plaintiff's claim.[3] To allow the defendant to recover on his counterclaim a greater amount than the court is allowed to try in a direct action is to strike at the foundations of jurisdictional limitations on lower courts. By such a rule it becomes

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[4] Greenl. Ev., 16th ed., § 441 b.

[5] *Cf.* Cornell *v.* Green, 10 S. & R. (Pa.) 14, 16; Commonwealth *v.* Sturtevant, 117 Mass. 122; Hardy *v.* Merrill, 56 N. H. 227, 241.

[6] Dickenson *v.* Inhabitants of Fitchburg, 13 Gray (Mass.) 546, 555; Kostelecky *v.* Scherhart, 99 Ia. 120.

[7] Cass *v.* Boston & Lowell R. R. Co., 14 Allen (Mass.) 448; Grand Trunk R. R. Co. *v.* Richardson, *supra.*

[1] See Haygood *v.* Boney, 43 S. C. 63.

[2] Griswold *v.* Pieratt, 110 Cal. 259; Almeida *v.* Sigerson, 20 Mo. 497.

[3] Standley *v.* Northwestern, etc., Co., 95 Ind. 254.

possible for courts regarded as competent to try only the very smallest cases, to usurp the jurisdiction of the highest court. By the rule of the principal case jurisdictional limits would be set at naught by a provision having no direct bearing on them. On the other hand the plaintiff has a right to sue in these lower courts if he has a proper claim. The fact that by doing so the defendant will not be able to secure certain extraordinary relief he might otherwise have, does not seem sufficient ground for holding as is done in South Carolina, that the defendant may throw the plaintiff out of court. As a question at law, then, the view taken by the majority of the courts seems sound. The plaintiff has a right to sue in this court, and the defendant cannot avail himself of the general right to counterclaim because he cannot bring his cause of action within the proper limits.

As, however, the defendant, merely because of the size of his claim, is deprived of substantial relief at law to which he would otherwise be entitled, on the analogy of certain other cases, he should have relief in equity. If a defense ordinarily available at law cannot under the peculiar circumstances of a case be used, equity will enjoin execution of the judgment.[4] So in these cases the defendant ought to be allowed an injunction against the execution of the plaintiff's judgment till, proceeding with due diligence, he can procure his judgment to set off against the plaintiff's. If necessary equity might well go farther, and not only enjoin execution of the plaintiff's judgment, but also bring the plaintiff into equity and set off his judgment against the defendant's claim. Where the plaintiff is insolvent and the defendant's claim cannot be set up against him at law, this relief is commonly granted.[5]

Discrimination against Negroes as Jurors. — Few questions arising under the Fourteenth Amendment have proved more fruitful of controversy than that as to discrimination against negroes in drawing jurors. It is, indeed, no longer disputed that a statute providing that only white men shall be eligible as jurors is in conflict with the amendment. A negro tried by a jury empanelled under such a statute, or tried under an indictment found by a grand jury so drawn, is deprived of the "equal protection of the laws."[1] On the other hand, it is clear that a negro is not entitled to trial by a jury composed in whole or in part of members of his own race. All that is required is that no discrimination shall be made, in constituting the jury, on the ground of race.[2] Negroes and white men who have the same qualifications as to property, intelligence, and the like, must stand the same chance of being drawn as jurors.

The real dispute comes in the case in which a statute provides that public officers shall select from the whole body of citizens such as they think competent to act as jurors, the grand and petit juries to be drawn from among the persons so selected. Undoubtedly such a statute makes it easy to exclude negroes, disqualified in no respect except as to race, with little chance of detection. Yet the fact that this danger exists is not, in itself, a ground of objection. A negro cannot complain that he is deprived of his constitutional rights, unless he can prove that there was, in fact, discrimination on

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[4] Baltzell & Chapman *v.* Randolph, 9 Fla. 366.
[5] Hiner *v.* Newton, 30 Wis. 640.

[1] Strauder *v.* West Virginia, 100 U. S. 303; Neal *v.* Delaware, 103 U. S. 370.
[2] Virginia *v.* Rives, 100 U. S. 313.

the ground of race in selecting the grand or petit jury, as the case may be.[3] But there is no conclusive presumption that the officers have exercised an honest judgment; if the fact is clearly shown to be otherwise, and the accused nevertheless compelled to stand trial, the amendment is violated.[4]

In a decision just announced by the Supreme Court of the United States, this principle is reaffirmed. *Rogers* v. *Alabama*, 24 Sup. Ct. Rep. 257. The accused objected that the commissioners appointed to select the grand jury excluded all negroes solely on the ground of color. This objection was overruled by the state court, as not made in proper form. The United States Supreme Court, however, held that the point was properly raised and the objection good in substance. As the state court had previously declared that the statute under which the jurors were selected warranted no such discrimination,[5] it might be argued that the act complained of was not the act of the state. If the commissioners, in making the alleged discrimination, acted in violation of their duty, their act could hardly be called the act of the state. And it is plain that the amendment applies only to the acts of the states,[6] and that the Supreme Court cannot review the action of a state court, if it has failed to give relief from the wrongful act of an individual because of a mistaken opinion on a point of procedure.[7] But the accused was deprived of his constitutional rights not only by the act of the commissioners, but also by the act of the court in pronouncing judgment after a trial under the improper indictment.[8] This was clearly the act of the state and within the purview of the amendment. A federal question being thus raised, it is settled that the Supreme Court may go into the merits of the case, although the state court may have held that the constitutional point could not be considered because not properly pleaded.[8]

Conflicting Equitable Claims to the Same Res. — When a person is subject to two equally meritorious equitable claims for the same property owned or subsequently acquired by him, the claim prior in point of time is preferred.[1] Since both are equally meritorious with the sole difference that the prior, when it arose, immediately attached to the property as an equity, or, if the property was not yet acquired, gave an inchoate right to control the property when it should be acquired, a subsequent claim without greater merit should not displace the already existing equitable right. A recent New Jersey case, where the subsequent claim arose out of the very acquisition of the property by the obligor, opens the discussion of a more troublesome question. One Wood, under a duty to a corporation to pay the price of land out of his own substance, bought the land under an option which he held in trust for that corporation, and paid for it, in breach of trust, with part of a fund he held in trust for a third person. It was held that the third party, as against the corporation, had no rights in the land. *Seacoast R. Co.* v. *Wood*, 56 Atl. Rep. 337.

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[3] Williams *v.* Mississippi, 170 U. S. 213.
[4] Neal *v.* Delaware, *supra.*
[5] See Green *v.* State, 73 Ala. 26.
[6] Civil Rights Cases, 109 U. S. 3.
[7] *Cf.* Caldwell *v.* Texas, 137 U. S. 692.
[8] Carter *v.* Texas, 177 U. S. 442.

[1] Cory *v.* Eyre, 1 De G., J. & S. 149.

The cases on the point that have arisen are principally cases in which a person under a prior equity to convey property which he did not own, either received a conveyance from the owner to hold on an express trust [2] or induced a conveyance from the owner by fraud.[3] In either case it is held that the grantor should be preferred. A conclusive answer to the prior equitable claimant is that the grantor, although he is the subsequent obligee, has in fact the prior interest in the very property, which here also should not be displaced by a claim which has no greater merit. Before the accrual of the first obligation, the subsequent obligee had not only the beneficial, but also the legal interest in the property. The only diminution of that interest has been a conveyance, but a conveyance in its inception merely of the bare legal title with a retention of the beneficial interest, in the one case, by the express agreement, in the other, on account of the fraud. If the obligor were claiming for his own benefit, the conflicting right of his grantor would be absolute.[4] It follows that the equitable claim of the prior obligee can be no greater, since his only equitable right is to the property of his obligor, and by the analysis the obligor has only a title subject to an existing equity.

It is submitted that these cases apply with effective force in the solution of the principal case. When Wood wrongfully used the trust fund to discharge his obligation to pay the purchase price to the vendor, it was as if he had requested a stranger to discharge that obligation. On familiar principles, the stranger would be subrogated to the right of Wood's vendor to hold the land as security for the payment of the purchase price.[5] If the *cestui que trust* at Wood's request had authorized the use of the trust fund for the same purpose, there can be no doubt that the court of equity would allow him the same right of subrogation, as having substantially discharged Wood's obligation at the latter's request.[6] Since, by the misappropriation of the trust fund for the same purpose, Wood compelled the discharge of the obligation by the *cestui que trust*, by a parity of reasoning the same result must follow. The land came, therefore, into the hands of Wood charged with the equity of subrogation in favor of the injured *cestui que trust*, and on the principle of the previous cases the claim of the corporation should have been postponed. The New Jersey decision, in reaching the contrary conclusion, is therefore deemed erroneous.

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[2] Kelley *v.* Jenness, 50 Me. 455.
[3] Eyre *v.* Burmester, 10 H. L. Cas. 90.
[4] Tyler *v.* Black, 13 How. (U. S.) 230.
[5] Faulk *v.* Calloway, 123 Ala. 325.
[6] See Bigelow *v.* Scott, 135 Ala. 236.

RECENT CASES.

BANKRUPTCY — PREFERENCES — BANK DEPOSITS. — The bankrupts during the three days before the filing of their petition in bankruptcy deposited $5000 in a bank in which they habitually kept an account. The bankrupts were at the time insolvent, as the bank knew, and were liable on notes to the bank for $40,000. *Held*, that the deposit is not a preference, and may be set off against the bank's claim. *New York County National Bank* v. *Massey*, 24 Sup. Ct. Rep. 199.

The deposit was considered not a preference because § 60a defining preferences requires a "transfer" of property and § 1, (25) provides "'transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." The court lays stress on the last six words. Those words, however, may well be taken as examples and the real definition be found in the first part of the clause, as was done in the court below. *In re Stege*, 116 Fed. Rep. 342. Such an interpretation, it is true, would make the set-off provisions inconsistent with the preference provisions in a very few cases, of which this is the first to arise. In these cases the general purpose of bankruptcy legislation looking to equality among creditors would indicate that the preference provisions should control. By the rule of the principal case a crafty debtor by making loans instead of payments could favor what creditors he chose, thus making useless the elaborate guards against preferences.

CARRIERS — RAILROAD'S LIABILITY FOR LOSS OF BAGGAGE UNACCOMPANIED BY OWNER. — The plaintiff checked his trunk from New Jersey to Wiscasset, Maine. The trunk reached Wiscasset over the defendant's railroad in due time, but the plaintiff, having gone in part by another route, did not arrive there until the next day. In the mean time the contents of the trunk were stolen from the baggage room. *Held*, that the defendant is a gratuitous bailee and bound to exercise no more than ordinary care. *Wood* v. *Maine Central R. R. Co.*, 56 Atl. Rep. 457 (Me.).

A common carrier is liable as an insurer for a passenger's baggage. *Hannibal Railroad* v. *Swift*, 12 Wall. (U. S.) 262. Baggage consists of those articles usually taken by travellers for their pleasure, convenience, and comfort. The right to take baggage is merely incidental to the right to be carried as a passenger. Consequently goods sent by a road other than that which the traveller takes are not baggage. *Marshall* v. *Pontiac, etc., R. R. Co.*, 126 Mich. 45. Furthermore it has generally been held that, apart from special agreement, goods are not baggage when, without fault of the carrier, they do not go on the same train with their owner. *Wilson* v. *Grand Trunk Ry.*, 56 Me. 60. It would seem more reasonable that goods should be considered baggage, whether they precede or follow the passenger, if they are *bona fide* incidental to passage over the carrier's line. As the law is settled otherwise, the principal case is sound on any view of the facts. Since the defendant never assented to carrying the trunk as freight, or to holding it as a warehouseman or a bailee for hire, the court rightly held the liability to be only that of a gratuitous bailee.

CONFLICT OF LAWS — CONTRACTS — DAMAGES RECOVERABLE FOR BREACH. — The defendant negligently failed to deliver in South Carolina a telegram sent in North Carolina, thereby causing mental suffering to the plaintiff. Recovery for mental anguish could be had by North Carolina, but not by South Carolina, law. *Held*, that the plaintiff can recover damages for mental anguish. *Bryan* v. *Western Union Tel. Co.*, 45 S. E. Rep. 938 (N. C.).

The court brought the case under the general rule, supported by the weight of American authority, that the law of the state where the contract is made, not where it is to be performed, tests its validity, nature, and interpretation. *Staples* v. *Nott*, 128 N. Y. 403; see 13 HARV. L. REV. 296. The principle has been applied where the validity of a clause in a contract limiting liability for non-delivery of a telegram was in issue. *Reed* v. *Western Union Tel. Co.*, 135 Mo. 661; *contra*, *Burnett* v. *Penn. R. R. Co.*, 176 Pa. St. 45. But in the principal case the kind of damages recoverable for non-delivery depends, not on any provision of the contract, but on the provisions of the law which gives the right to damages of any kind for its breach. This right to damages is distinct from the right to performance given by the contract. It arises from a

failure to perform. The only law that can effectively declare that any failure to act gives rise to a right is the law of the place where the failure to act occurs. The extent of the right in the principal case, therefore, should depend on the law of the place of performance. *Ex parte Heidelback*, 2 Low. (U. S. Dist. Ct.) 526; *Bowen* v. *Newell*, 13 N. Y. 290.

CONFLICT OF LAWS — TAKING OF DEPOSITION FOR USE OUTSIDE THE STATE. By the laws of Oklahoma, notaries public may take depositions to be used in the courts of that Territory, provided one day's notice is given to both parties to the action. By the laws of Missouri, notaries public may take depositions in that state, provided three days' notice is given. The petitioner, subpœnaed by a Missouri notary to give a deposition in an Oklahoma action, refused to testify on the ground that the notice given was insufficient according to Missouri law. Being committed for contempt, he brought *habeas corpus* proceedings. *Held*, that since the sufficiency of the notice is to be determined by Oklahoma law, the commitment is valid. *In re Woggan*, 77 S. W. Rep. 490 (Mo., Ct. App.).

As few jurisdictions have provided until recently for commitment for a refusal to give evidence for use without the state, the case is one of first impression. The question whether the deposition is admissible in the Oklahoma action must clearly be decided by the law of that forum. *Evans* v. *Eaton*, 7 Wheat. (U. S.) 356, 426; *McGeorge* v. *Walker*, 65 Mich. 5. The court seems to have confused that question with the one really presented by the case, namely, upon what condition a Missouri witness may lawfully be required to give evidence before a Missouri notary in Missouri. In issuing the warrant of commitment the notary was acting as an officer of Missouri, and his act had significance only by virtue of a statute of that state, which, being in derogation of the liberty of the citizen, should be strictly construed. *Ex parte Mallinkrodt*, 20 Mo. 493. It would appear that the requisites for the validity of such a warrant should be determined by the law which alone gives the warrant force.

CONSTITUTIONAL LAW — DUE PROCESS — LOCAL ASSESSMENTS. — The defendant city's charter gave it the right to order owners of property abutting on the water front to erect docks on or in front of their premises, and, in case they failed to comply with the order within a certain time, to award the contract for such work and to levy the cost on the land as a local assessment. *Held*, that the charter provision is unconstitutional as depriving the plaintiff of his property without due process of law. *Lathrop* v. *City of Racine*, 97 N. W. Rep. 192 (Wis.).

Building docks for public use seems analogous to other public improvements, as, for example, the laying out of streets. Local assessments upon the abutting land to meet the expense of such improvements are generally held an exercise of the taxing power rather than of the police power. *Motz* v. *City of Detroit*, 18 Mich. 495; see *Chicago, etc., R. R. Co.* v. *City of Ottumwa*, 112 Ia. 300, 305. The basis for upholding their constitutionality is the equity of compelling property specially benefited by the improvement to contribute toward the expense to the extent of such benefit. *Edwards* v. *Walsh Construction Co.*, 117 Ia. 365. There is a strong presumption that the legislative body or commission making the assessment has decided rightly as to the extent of the benefit resulting to the assessed property. *Chicago & Alton R. R. Co.* v. *City of Joliet*, 153 Ill. 649. The courts will interfere, however, in cases where the assessment is palpably unjust. *Zoeller* v. *Kellogg*, 4 Mo. App. 163; *Norwood* v. *Baker*, 172 U. S. 269. In the principal case the charter apparently gave authority to assess the property on the water front regardless of any benefit resulting from the construction of the docks; and the decision consequently appears entirely sound. *Sears* v. *Street Commissioners of Boston*, 173 Mass. 350. For a fuller discussion of the general question of local assessments see 14 HARV. L. REV. 1, 98; 15 HARV. L. REV. 307.

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS. — The mechanics' lien law provided that "in an action brought by any artisan or day laborer to enforce any lien under this act, where judgment be rendered for plaintiff, the plaintiff shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action." Gen. St. Kan. 1901, § 5125. *Held*, that the statute is unconstitutional as denying the equal protection of the laws. *Atkinson* v. *Woodmansee*, 74 Pac. Rep. 640 (Kan.).

It is well established that the legislature may make classifications and distinctions based thereon. But the "classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. There seems to be no reason of public policy

requiring the prompt payment of claims for which a mechanics' lien will attach, which cannot be urged with equal force in the case of many other classes of claims. The decision therefore appears sound in holding the statute unconstitutional. *Gulf, etc., R. R. Co.* v. *Ellis*, 165 U. S. 150. While the constitutionality under the Fourteenth Amendment of the particular statutory provision involved does not appear to have been directly adjudicated before, it has occasionally been questioned under similar provisions in state constitutions. While these decisions are in some conflict, the weight of authority is in accord with the decision in the principal case. *Grand Rapids Chair Co.* v. *Runnells*, 77 Mich. 104; *Randolph* v. *Builders, etc., Co.*, 106 Ala. 501; *contra*, *Wortman* v. *Kleinschmidt*, 12 Mont. 316.

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS — DISCRIMINATION AGAINST NEGROES AS JURORS. — An Alabama statute provides that commissioners shall select from the male residents of each county such persons as in their opinion are fit and competent to discharge the duties of jurors. A negro, indicted by a grand jury thus drawn, moved to quash the indictment, on the ground that the commissioners had excluded all negroes from the list from which the grand jury was drawn, solely on the ground of color. The motion was stricken from the files and the defendant's exceptions to this action overruled, on the ground that the motion was not made in proper form. *Held*, that a federal question is raised and that the defendant is deprived of the "equal protection of the laws." *Rogers* v. *Alabama*, 24 Sup. Ct. Rep. 257. See NOTES, p. 351.

CONSTITUTIONAL LAW — EXCLUSION OF FOREIGN CORPORATIONS BY A STATE. A state statute imposed conditions upon foreign corporations continuing to do business in the state. Certain foreign corporations already in the state sought to enjoin the enforcement of the statute on the ground that it was unconstitutional under both the state and the national constitutions. *Held*, that the plaintiff, being a foreign corporation, cannot object to the statute. *Hartford Fire Ins. Co.* v. *Perkins*, 125 Fed. Rep. 502 (Circ. Ct., S. Dak.).

The court here refused the injunction on the ground that a foreign corporation has no constitutional right to do business in a state, and consequently cannot be injured by any condition imposed upon it by the legislature; and therefore is in no position to object to the constitutionality of such conditions. This view, in assuming that a condition imposed by the legislature is necessarily imposed by the state, overlooks the consideration that the legislature represents the state only when acting within constitutional limits. Objections under the state constitution should, therefore, be open to foreign corporations in order that they may protect rights vested under previous constitutional legislation. *Niagara Fire Ins. Co.* v. *Cornell*, 110 Fed. Rep. 816. Moreover, even conditions imposed by the state must not conflict with the national constitution which forms a part of the supreme law of the land. *Commonwealth* v. *Mobile, etc., Ry. Co.*, 64 S. W. Rep. 451 (Ky.). For instance, foreign corporations may invoke the protection of the federal constitution against conditions which impair vested contract rights. *New York, etc., Ry. Co.* v. *Pennsylvania*, 153 U. S. 628. The principal case is believed to be a misconception and unsupported by authority.

CONSTITUTIONAL LAW — POLICE POWER — CLASSIFICATION. — A state statute required the examination and registration of plumbers and the observance of specified regulations in plumbing in cities exceeding a certain population. *Held*, that the statute is constitutional. *Beltz* v. *Pittsburg*, 34 Pittsburgh L. J. 197 (Ct. of C. P. No. 1, Allegheny Co., Pa.).

The liberty and equal protection of the laws guaranteed to citizens by the Constitution are admittedly not infringed by a reasonable exercise of the police power in the promotion of health, good order, or morals. *Ruhstrat* v. *People*, 185 Ill. 133. Thus, the plumbing of dwelling-houses and the examination and licensing of plumbers are proper subjects of legislative regulation. *People* v. *Warden of City Prison*, 144 N. Y. 529. Moreover, police regulations may be applied to particular localities only, and will be consistent with the equal protection of the laws so long as the classification of localities is reasonable. *Sutton* v. *State*, 96 Tenn. 696. If the classification is unreasonable, although made in good faith, several states hold that the statute is unconstitutional. *In the Matter of Jacobs*, 98 N. Y. 98; see *Ruhstrat* v. *People*, *supra*. The weight of authority, however, holds that unless the classification is so unreasonable as to disprove good faith, it is constitutional. *Hayes* v. *Missouri*, 120 U. S. 68; *State* v. *Chicago, etc., R. R.*, 68 Minn. 381. Since the importance of sanitation varies according to the density of population, the classification in the present statute appears reasonable, and on either view this exercise of the police power seems constitutional.

CONSTITUTIONAL LAW — THIRTEENTH AMENDMENT — FEDERAL STATUTES SECURING RIGHT TO OWN REALTY. — The Federal Civil Rights Act (U. S. Comp. St. 1901, p. 1262) secures to negroes the same privileges to acquire and to own real property as are enjoyed by white citizens. The defendants were indicted under U. S. Comp. St. 1901, p. 3712, for conspiring to intimidate negroes in the exercise of the right thus secured. *Held*, that the Civil Rights Act is constitutional under the Thirteenth Amendment. *United States* v. *Morris*, 125 Fed. Rep. 322 (Dist. Ct., E. D. Ark.).

The statute cannot be upheld under the Thirteenth Amendment, which prohibits involuntary servitude, unless the bestowal of the right to acquire and own real property is an appropriate method of preventing involuntary servitude. Though interference with this right could hardly go far toward producing slavery, it is clear that to a certain extent it is easier to enslave persons who have not been allowed to own real property, than persons who have freely exercised this right, and interference with the right to acquire realty has been a feature of movements whose apparent object was to reduce the negro to a condition of serfdom. These considerations would seem to justify the decision, for in selecting means for the protection of rights conferred by the constitution, Congress should be permitted to make provision for situations which are remote and potential, as well as for those which are apparent and imminent. *Cf. McCullough* v. *Maryland*, 4 Wheat. (U. S.) 316, 421. The principal case is sustained by two federal decisions in which the constitutionality of the same act was involved. *United States* v. *Rhodes*, 1 Abb. (U. S. C. C.) 28; *In re Turner*, 1 Abb. (U. S. C. C.) 84.

CONSTRUCTIVE TRUSTS — RECOVERY FROM TRANSFEREE OF FORGED TRANSFER OF STOCK. — The defendant innocently presented a forged transfer of stock to the plaintiff company and received new certificates, which were in turn transferred to *bona fide* purchasers. When the forgery was later discovered, the plaintiff was forced to issue equivalent stock to the true owner, and now seeks indemnity from the defendant. Neither party was negligent. *Held*, that the defendant is not liable. *Corporation of Sheffield* v. *Barclay*, [1903] 2 K. B. 580.

The decision of this case in the court below was discussed in 16 HARV. L. REV. 228; see also 4 *ibid.* 297, 307, 307 n. 3.

CONTRACTS — CONSTRUCTION OF CONTRACTS OF EMPLOYMENT. — The respondent contracted to act as superintendent of a cotton compress and warehouse for the appellant company. In an action by the respondent to recover damages for an alleged unlawful discharge, the trial court ruled that the respondent might, during the employment, lawfully perform services to third persons which did not interfere with his work for the appellant. *Held*, that the ruling is erroneous, since the respondent owed all of his time to the appellant. *Atlantic Compress Co.* v. *Young*, 45 S. E. Rep. 677 (Ga.).

The meaning of the term "superintendent" in the present contract requires a knowledge of the duties of a superintendent in that occupation. If the employment is one in which the employee is hired merely to accomplish definite tasks, the court may well find that his hours of work are discretionary and that he has not promised his whole time to his employer. *Jaffray* v. *King*, 34 Md. 217. If, on the other hand, the employee's duty is to attend, like an operative, to such tasks as may arise during business hours, the court may find that he has promised all his working time. Had the duties of the present employee been unfamiliar to the court, the court might better have required the jury to find them before construing the contract, since the jury finds the meaning of technical terms. *Hutchinson* v. *Bowker*, 5 M. & W. 535. If, however, these duties were a matter of common knowledge in the jurisdiction, the court could take judicial notice of them. *Brown* v. *Piper*, 91 U. S. 37. Since this might fairly have been the fact, the decision seems sound.

CORPORATIONS DE FACTO — EFFECT OF STATUTES PASSED AFTER ORGANIZATION. — Under an unconstitutional statute, a school district organized as a corporation. Subsequently a constitutional statute was passed, but no attempt was made to organize thereunder, and the user of assumed corporate power under the original organization was continued. To an action of contract against the corporation, it was objected that no corporation existed. *Held*, that the defendant is liable as a corporation *de facto*. *Hancock* v. *Board of Education, etc.*, 74 Pac. Rep. 44 (Cal.).

Upon principle, the state is the sole source of corporate existence. Because of public convenience and business necessity, however, the doctrine of corporations *de facto* has become a recognized exception to this principle. The elements of corporate existence *de facto* are a statute, under which the corporation may be created, a *bona fide* attempt to organize under the statute, and a user of corporate powers. *Finnegan* v. *Noerenberg*, 52 Minn. 239. Under an unconstitutional statute there can be no corporate existence, *de jure* or *de facto*. *Brandenstein* v. *Hoke*, 101 Cal. 131. In the princi-

pal case, therefore, the first and second elements of corporate existence *de facto* are lacking. One jurisdiction, which has hitherto followed *Finnegan* v. *Noerenberg*, has so far inclined in the direction of convenience as to find corporate existence *de facto* when, at the time of organization under the unconstitutional statute, a valid statute existed under which the corporation might legally have organized. *Georgia Southern, etc., R. R. Co.* v. *Mercantile Trust, etc., Co.*, 94 Ga. 306. The present decision is unfortunate in departing still further from the general rule. See 16 HARV. L. REV. 362.

CORPORATIONS — INSOLVENT CORPORATIONS — PREFERENCE AMONG CREDITORS. The acting president of an insolvent corporation made a distribution of the corporate property among some of its creditors. The property was subsequently attached by other creditors of the corporation. *Held*, that the latter cannot inquire into the authorization of the president to create a preference among the corporation's creditors. *Beaman* v. *Stewart*, 74 Pac. Rep. 344 (Col., Ct. App.).

If the president acted with the authority of the directors, the property in suit belonged to the preferred creditors, since it is established in Colorado both that the surrender of an antecedent debt is valuable consideration and that the directors of an insolvent corporation may make a preference among creditors. *Knox* v. *McFarran*, 4 Col. 586; *Farwell Co.* v. *Sweetzer*, 10 Col. App. 421. If, on the other hand, the president acted without special authority, the property remained in the corporation. *Norton* v. *Alabama Nat'l Bank*, 102 Ala. 420. In that event the attaching creditors acquired a valid lien on the property. *Breene* v. *Merchants' & Mechanics' Bank*, 11 Col. 97. For no principal can ratify an unauthorized disposition of his property by his agent so as to destroy the rights of intervening attachment creditors, and it is immaterial that the principal is a corporation. *Galloway* v. *Hamilton*, 68 Wis. 651. Since, then, the validity of the attachment lien depended on whether the property belonged to the corporation at the time of attachment, and since this, in turn, depended entirely on whether the president acted with authority, it would seem to follow that the creditors might inquire into his authority.

DANGEROUS PREMISES — DUTY OF LANDOWNER TO WARN VISITORS OF DANGER OF ASSAULT BY STRANGERS. — The defendant, who maintained a park for the entertainment of the public, with knowledge of a conspiracy on the part of certain persons to assault negroes visiting the park, permitted the plaintiff, a negro, to enter without taking measures to protect him from danger. *Held*, that the defendant is liable for injuries inflicted upon the plaintiff in pursuance of the conspiracy. *Indianapolis Street Ry. Co.* v. *Dawson*, 68 N. E. Rep. 909 (Ind., App. Ct.).

A landowner must exercise ordinary care to keep his premises safe for a business visitor or to warn him of danger arising from their unsafe condition. This principle has heretofore been applied mainly with reference to defects in the physical condition of the premises themselves. *Indermaur* v. *Dames*, L. R. 1 C. P. 274. Recovery has, however, been allowed in one case where the danger was caused by strangers rightfully engaged in shooting on the land. *Conradt* v. *Clauve*, 93 Ind. 476. The principal case goes to the extreme of allowing recovery for injuries intentionally inflicted by third persons whose acts were criminal in their nature. But the fact that the premises were unsafe for the plaintiff and that his presence there would result in the damage complained of was known to the defendant when it invited the plaintiff to enter its park. If as a result of the defendant's invitation an unsuspecting plaintiff has been either intentionally or negligently led into a trap, his right to demand indemnity from the defendant should not depend upon the particular manner in which he meets with injury.

DANGEROUS PREMISES — LIABILITY TO TRESPASSERS — CHILDREN TRESPASSERS. The plaintiff, a child twelve years old, while playing with other children in a grove situated partly on the defendant's and partly on adjacent land, was injured by running into a barbed wire, a remnant of a fence that originally bounded the defendant's land from the rest of the grove. The defendant knew the condition of the property and the habit of children of playing in the grove. *Held*, that the questions of the defendant's negligence and of the plaintiff's contributory negligence should be left to the jury. *Cincinnati, etc., Co.* v. *Brown*, 69 N. E. Rep. 197 (Ind., App. Ct.).

Unlike the "turntable cases," the thing which attracts the children here, namely the grove, is not dangerous in itself nor the instrument of injury; nor is it an artificial structure maintained by the landowner. On the other hand, the instrument of injury, as the landowner knows, has ceased to be of any use. The issue involved is discussed in 11 HARV. L. REV. 349; 12 *ibid.* 206.

EVIDENCE — CUSTOM AS EVIDENCE OF DUE CARE. — The plaintiff, while riding on a ladder on the side of a freight car, was knocked from it and injured by another car

which the defendants had negligently left too near the track. Evidence that it was a general custom among switchmen to ride on the side of freight cars in the yards, was offered to prove the plaintiff's due care. *Held*, that the evidence is admissible. *Boyce* v. *Wilbur Lumber Co.*, 97 N. W. Rep. 563 (Wis.). See NOTES, p. 349.

EVIDENCE — EXPECTANCY OF LIFE — AGE OF PARENTS. — In an action for damages arising from permanent personal injuries, the plaintiff desired to show an expectancy of life beyond that given in the mortality tables by the testimony of experts who were to base their opinions on the mortality tables and on the fact that the plaintiff's father and grandfather lived to advanced ages. *Held*, that the evidence is not admissible. *Hamilton* v. *Michigan Cent. R. R. Co.*, 97 N. W. Rep. 392 (Mich.).

That longevity is hereditary the science of biology leaves no room to doubt. In determining any person's expectancy of life, therefore, the ages attained by his parents and grandparents are logically relevant. This evidence is not excluded by the use of the mortality tables, for while these tables are uniformly admitted, they are not conclusive evidence. *Vicksburg, etc., R. R. Co.* v. *Putnam*, 118 U. S. 545. The only question remaining is whether or not the longevity of the parents is of such slight probative value in determining the plaintiff's expectancy of life that it ought not to be submitted to the jury. The fact that life insurance companies have found by experience that it is unsafe to insure persons whose parents and grandparents have died young tends to lead to the conclusion that the evidence should be admitted. But one case raising this question has been found, and in that case the evidence was admitted. *Chattanooga R. R. Co.* v. *Clowdis*, 90 Ga. 258.

EVIDENCE — POST-TESTAMENTARY DECLARATIONS OF TESTATOR. — When last seen a will was in the hands of a person to whose interests its provisions were adverse. Subsequently the testator made statements tending to show that he had revoked the will. In proceedings for probate of the lost will, the contestants sought to introduce evidence of these statements to rebut the presumption that the will was not revoked. *Held*, that the evidence is admissible. *McElroy* v. *Phink*, 76 S. W. Rep. 753 (Tex., Sup. Ct.).

On the question as to the general competency of post-testamentary declarations on issues as to the existence and validity of wills, there is a marked confusion of authority. *Cf. Jackson* v. *Kniffen*, 2 Johns. (N. Y.) 31; *Henry* v. *Hall*, 106 Ala. 84. But since a court might properly be reluctant to dispose of an estate solely upon a presumption arising from the mere custody of a will when last seen, it might well allow evidence to be introduced to rebut such a presumption which would be inadmissible on other issues. Accordingly, although this distinction has not been expressly taken, no case found excluded the evidence when it was introduced merely to rebut a presumption against the existence of a lost will. *Cf. Keen* v. *Keen*, L. R. 3 P. & D. 105. The fact that here the evidence was introduced to rebut a presumption in favor of the existence of a lost will should not distinguish the principal case. The evidence, moreover, is strengthened by all the considerations which justify exceptions to the hearsay rule, namely, the peculiar knowledge of the declarant, the absence of motive to deceive, and the lack of better evidence. *Cf. Sugden* v. *Lord St. Leonard*, 1 P. D. 154.

EVIDENCE — PRIVILEGE — INFERENCE FROM EXCLUSION BY PATIENT OF PHYSICIAN'S TESTIMONY. — A statute provided that physicians should not divulge professional information acquired from a patient. *Held*, that a charge that the jury is not prevented under the law from drawing inferences from a patient's refusal to allow his physician to testify is correct. *Deutschmann* v. *Third Ave. R. R. Co.*, 84 N. Y. Supp. 887.

The statute fails to make express provision either for or against the drawing of an inference against the patient from the exercise of his privilege. In civil actions the exclusion of material evidence by a party, or the failure to produce it if it is in his power to do so, have generally been held to justify an unfavorable inference. *Gulf, etc., Ry. Co.* v. *Ellis*, 54 Fed. Rep. 481. It is the duty of all persons interested in a suit not to prevent the impartial adjudication of the questions at issue, and they cannot complain if an unfavorable inference is drawn from their doing so. Where, however, public policy has dictated legislation expressly reserving to a party the privilege of excluding certain testimony, the general rule should not be applied. For if a party, in exercising the right secured to him by law, thereby exposes his cause to damaging inferences, the benefit of his privilege is practically destroyed. For this reason the decision in the principal case seems questionable.

LIBEL — PHOTOGRAPH OF PLAINTIFF IN CONNECTION WITH LIBELOUS ARTICLE. The defendant published an account of the life of an Italian bandit, illustrating the

article with a photograph of the plaintiff, named underneath as that of the bandit. The article referred to the photograph as that of the brigand, and stated that he was in Italy. The plaintiff was in New York at the time. *Held*, on demurrer, that the facts will sustain an action of libel. *De Sando* v. *New York Herald Co.*, 85 N. Y. Supp. 111.

A man's right to have his good name left unsullied is fundamental. An article which leaves an ordinary person reading it with the impression that the plaintiff has committed a crime is certainly an infringement of this right, and should be actionable as much as if the plaintiff were mentioned by name. *Smith* v. *Sun Publishing Co.*, 50 Fed. Rep. 399. Since in the present case many readers who did not know the plaintiff might, upon seeing him at some future time, connect his face with the crimes of the brigand and set him down as a scoundrel, any decision other than that reached by the court would seem impossible.

LIMITATION OF ACTIONS — ABSENCE OF DEFENDANT FROM STATE — FOREIGN CORPORATIONS. — By the Kansas statute of limitations, if a person is out of the state when the cause of action accrues against him, the statutory period does not begin to run in his favor until he comes into the state. A foreign corporation had property within the state, and maintained an office where service of process could be had on its division superintendent. *Held*, that the statutory period does not run in favor of the corporation. *Williams* v. *Metropolitan St. Ry. Co.*, 74 Pac. Rep. 600 (Kan.).

By the weight of authority, liability to service of process tests the running of the statute. *Lawrence* v. *Ballou*, 50 Cal. 258. But many courts, as in the principal case, conclude that since a corporation cannot exist outside the state which creates it, it cannot, therefore, "come into the state." *Olcott* v. *Tioga Ry. Co.*, 20 N. Y. 10. It is true that a foreign corporation is not within the state even in a sense corresponding to the temporary presence of a natural person, since service can be had, not on any officer, as in the state of domicil, but only on an agent to receive service. The designation of such an agent, however, gives personal jurisdiction of the corporation; and the words "within the state" might reasonably be construed to mean "within the jurisdiction of the state," as the obvious intent of the statute is to exempt from suit all persons, natural or artificial, who have been liable to suit for the statutory period. The principal case commits another jurisdiction to the less reasonable doctrine.

MORTGAGES — EQUITABLE MORTGAGE ON INSURANCE MONEY. — Land was mortgaged to the defendant, the mortgagor agreeing to insure the premises in the defendant's name and the latter, on default, to have the right himself to insure and to add the premiums to the debt. The defendant assigned the mortgage and the debt to the plaintiff, guaranteeing payment, and then purchased the mortgagor's interest without assuming the mortgage, and insured in his own name. The buildings burned and the insurance company, with notice of the provisions of the mortgage, paid the defendant. The plaintiff then sued the defendant and the insurance company in equity for the proceeds of the insurance. *Held*, that the plaintiff has an equitable lien on the proceeds of the policy, enforceable against the company and the defendant. *Hyde* v. *Hartford Fire Ins. Co.*, 97 N. W. Rep. 629 (Neb.).

If a mortgagor, contrary to agreement, makes the policy payable to himself, the mortgagee has an equitable lien on the proceeds. *Nichols* v. *Baxter*, 5 R. I. 491. The same is true if the insured is an assignee of the mortgagor who has assumed the mortgage. *Miller* v. *Aldrich*, 31 Mich. 408; see *James* v. *West*, 65 N. E. Rep. 156. By the better view, the agreement does not run with the land so as to charge an assignee not assuming the mortgage. *Farmers' Loan, etc., Co.* v. *Penn. Plate Glass Co.*, 186 U. S. 434; see *Reid* v. *McCrum*, 91 N. Y. 412. In the principal case such an assignee was denied the insurance on the ground that he had in effect by his guaranty assumed the mortgage; and that by effecting his insurance he unjustly prevented the mortgagee from insuring according to the mortgage. Neither reason seems sound. The defendant's liability remained purely that of guarantor; he assumed no rights or duties under the mortgage. And his insurance deprived the plaintiff of no rights; for a mortgagee, or his assign, has a separate insurable interest. *Hanover Fire Ins. Co.* v. *Bohn*, 48 Neb. 743. Consequently the defendant would seem entitled to insure his separate interest and to keep the proceeds.

MORTGAGES — FORECLOSURE SALE — LIEN OF PURCHASER. — The plaintiff purchased mortgaged property at a foreclosure sale, subject to the right of the defendant, the mortgagor, to redeem within a year. The defendant redeemed but refused to pay taxes which had become an incumbrance upon the estate during the year, and which the plaintiff had paid to secure his lien. The plaintiff then sought to establish a lien on the estate for the amount of the taxes. *Held*, that the lien of the plaintiff extends

only to the amount of his bid and interest. *Government Building and Loan Institution* v. *Richards*, 68 N. E. Rep. 1039 (Ind., App. Ct.).

This follows the trend of the books. *Walton* v. *Hollywood*, 47 Mich. 385; see *Nopson* v. *Horton*, 20 Minn. 268. The conclusion, however, seems to be based on cumulative *dicta* in different cases rather than upon actual decisions or equitable principles. Since the purchaser's right is against the land alone and not against the mortgagor, he cannot recover over against the mortgagor for taxes paid if there is no redemption. *Davis* v. *Dale*, 150 Ill. 239. It does not follow that he may not have a lien for the taxes. A mortgagee may in equity add to the mortgage debt taxes paid before the foreclosure sale to preserve his lien. *Bell* v. *Mayor, etc., of New York*, 10 Paige (N. Y.) 49. Where, as in the principal case, the period of redemption is by statute extended after the sale, it would seem that the purchaser is in a position analogous to that of such a mortgagee and that his lien should similarly cover these taxes. As such a result avoids the undeserved enrichment of the mortgagor involved in the principal case, it seems eminently just. It is reached in some states by statute. See *Davis* v. *Dale*, *supra*.

Offer and Acceptance — Acceptance by Mail. — The plaintiff, a lessee of the defendant, had an option by his lease to purchase the land at any time within the term. He mailed three letters accepting the option within the term, but as communication was interrupted by war, only one reached the defendant, and that after the expiration of the lease. *Held*, that there is no valid contract. *Bal* v. *van Staden*, 20 So. Afric. L. J. 407 (Transvaal, Sup. Ct.). See Notes, p. 342.

Parent and Child — Parent's Liability for Injuring Child. — In a suit for damages by a minor child against its parents, the declaration alleged cruel and inhuman treatment. *Held*, that the declaration states no cause of action. *McKelvey* v. *McKelvey*, 77 S. W. Rep. 664 (Tenn.).

It is universally held that the parent is liable criminally for the use of excessive force in the exercise of his right of control and correction. *Commonwealth* v. *Blaker*, 1 Brews. (Pa.) 311. But even here the courts are loath to interfere. *State* v. *Jones*, 95 N. C. 588. No authority has been found for making the parent answerable civilly for personal injuries inflicted upon the child. In fact, the present decision has the support of at least two cases, and is in accord with the reasoning and *dicta* in many others. *Foley* v. *Foley*, 61 Ill. App. 577; *Hewlett* v. *George*, 68 Miss. 703. The argument in favor of the parent's liability appears to be that, on principle, there is no reason why the parent should not be subject to a civil responsibility similar to that of a schoolteacher, who, though standing *in loco parentis*, is liable for excessive punishment. See Cooley on Torts, 2d ed., 197. This argument, however, is more than overcome by practical considerations of public policy, which discourage causes of action that tend both to destroy parental authority, and also to overwhelm the courts with a multitude of petty suits.

Practice — Appearance as Attorney by Judge. — In a state which was divided into circuits the jurisdictions of which were separate and distinct, a judge of one circuit attempted to appear as an attorney in the court of another circuit. *Held*, that when a lawyer becomes a judge his right to act as an attorney is temporarily suspended. *Perry* v. *Bush*, 35 So. Rep. 225 (Fla.).

The impartial and judicial frame of mind required in a judge makes it desirable that he give up for the time his practice of the law. Furthermore, his appearance before his fellow judges might bring extraneous influences to bear upon the decision of cases. Again, active advocacy by a public officer of the interests of one party to litigation would affect in an unfortunate manner the esteem in which the community holds the judiciary. Consequently it is usually provided by statute or constitutional provision that judges of courts of record shall not practise as attorneys. *Cf. Wood* v. *Keith*, 60 Ark. 425; *Seymour* v. *Ellison*, 2 Cow. (N. Y.) 13. In the absence of statute, as in the principal case, it is believed that the court itself can prevent a judge from practising, under its inherent power to preserve the proprieties of the bar and to prevent the miscarriage of justice. In some states by statute circuit judges are permitted to practise in courts other than their own. *O'Hare* v. *Chicago, etc., R. R. Co.*, 139 Ill. 151; *Morton* v. *Detroit, etc., R. R. Co.*, 81 Mich. 423. A judge may, of course, always appear for himself. *Libby* v. *Rosekrans*, 55 Barb. (N. Y.) 202.

Quasi-Contracts — Recovery against a Municipal Corporation. — A contractor, under a contract with the city of Chicago, was employed to construct a certain public improvement. Alterations were made in the work at the order of certain public officials who had no authority to make the changes. *Held*, that if the city has not ratified the alterations, the contractor can recover against it in quasi-contract. *City of Chicago* v. *McKechney*, 68 N. E. Rep. 954 (Ill.). See Notes, p. 343.

SEDUCTION — SURVIVAL OF ACTION TO THE MOTHER. — The defendant seduced the plaintiff's daughter while both parents were living. Prior to the commencement of suit the girl's father died. *Held*, that the mother has no right of action. *Hamilton* v. *Long*, 116 L. T. 171.

This decision is an affirmance by the Court of Appeal of the decision in the court below, which was commented on in 16 HARV. L. REV. 298.

SET-OFF AND COUNTERCLAIM — JURISDICTION OF LOWER COURTS. — In an action in a New York county court, the plaintiff filed a complaint for $900. The defendant filed a counterclaim for $30,000. The jurisdiction of county courts is limited to actions in which the complainant demands judgment for a sum not exceeding $2,000. *Held*, that the county court has jurisdiction over the counterclaim. *Howard Ironworks* v. *Buffalo Elevating Co.*, 176 N. Y. 1. See NOTES, p. 350.

STATES — ACQUISITION BY ONE STATE OF THE TERRITORY OF ANOTHER BY PRESCRIPTION. — The state of Wisconsin had exercised sovereignty over a certain island for over fifty years. In a suit between two individuals, the defendant disputed the plaintiff's title to the island, which was based on a patent granted by the state of Wisconsin, on the ground that according to the true boundary line between Wisconsin and Minnesota the island lay within the territory of the state of Minnesota. *Held*, that, as between the parties, the exercise of sovereignty by Wisconsin for the stated length of time is conclusive as to the proper location of the boundary line between the states. *Franzini* v. *Layland*, 97 N. W. Rep. 499 (Wis.). See NOTES, p. 346.

TAXATION — SUCCESSION TAX — DEBT DUE FROM FOREIGN DEBTOR. — The testatrix died domiciled in Vermont, leaving debtors in New York. The Vermont statutes impose a succession tax on "all property within the jurisdiction of this state . . . which shall pass by will or by the intestate laws of this state." *Held*, that the debts are not subject to the tax. *In re Joyslin's Estate*, 56 Atl. Rep. 281 (Vt.).

The court considers that the debts are for purposes of administration located in New York at the home of the debtor, and hence are not "property within the jurisdiction" of Vermont, and pass, not by the laws of Vermont, but by the laws of New York. But even granting the debts to be personalty actually located in New York, they would by a generally adopted fiction be regarded, for purposes of general taxation, as being within the jurisdiction in which their owner is domiciled. Succession tax cases almost without dissent apply the same rule. *Frothingham* v. *Shaw*, 175 Mass. 59. Moreover, it is by virtue of Vermont law that such property passes to the legatee. *Eidman* v. *Martinez*, 184 U. S. 578. New York, having actual control of personalty there located, could, it is true, dispose of it absolutely. In fact, however, New York permits the Vermont law to determine the succession, so that by the consent of New York the law of each state has a share in the passing of the property. N. Y. CODE, § 2694; see also *Blackstone* v. *Miller*, 188 U. S. 189. The Vermont statute by the better view should be regarded as applying to the property in question.

TAXATION — VALIDITY OF TAXES ASSESSED BEFORE AND CONFIRMED AFTER EXERCISE OF EMINENT DOMAIN. — The city of New York took the plaintiff's land by eminent domain. Prior to the passing of title to the city the annual tax upon the property was assessed to the plaintiff, but the assessment was not confirmed until after the transfer. *Held*, that the tax cannot be collected. *Buckhout* v. *City of New York*, 176 N. Y. 363.

The decision in the principal case in denying the validity of the tax in question seems sound. In New York the assessment of property is only an initial step in the process of taxation. See *Lathers* v. *Keogh*, 109 N. Y. 583. The taxing power with regard to land taken by eminent domain is necessarily extinguished when ownership vests in the city. The city, having exercised its right to take the land during the progress of tax proceedings, should not be entitled thereafter to continue those proceedings. When, subsequently to assessment, transfers of land between citizens have taken place, it has been held that the personal liability of the grantor for taxes is fixed by the assessment. *Rundell* v. *Lakey*, 40 N. Y. 513. But conceding that a liability does so arise, its enforcement by the city is conditional upon the completion of the tax. Since the city, after the exercise of eminent domain, has no power to perfect the incomplete tax, its conditional claim against the owner based on a previous assessment cannot be enforced.

TRUSTS — CONFLICTING EQUITIES — FOLLOWING TRUST PROPERTY. — One Wood held an option for the purchase of certain land in trust for a corporation, and, having received stock and bonds from the corporation, he assumed the duty to pay the pur-

chase price out of his own substance. He was also a trustee of a fund for a third party, and, in breach of trust, used a part of the fund to pay for the land, and received title. *Held*, that, as between the corporation and the third party, the former is entitled to the land to the exclusion of the latter. *Seacoast R. R. Co.* v. *Wood*, 56 Atl. Rep. 337 (N. J. Ch.). See NOTES, p. 352.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

RESCISSION FOR BREACH OF WARRANTY. — An article by Professor Williston in 16 HARV. L. REV. 465, on this subject, has called forth a reply from the author of a well-known treatise on Sales, Professor Francis M. Burdick, of Columbia Law School. *Rescission for Breach of Warranty*, 4 Columbia L. Rev. 1 (Jan. 1904). Professor Burdick, though evidently not in sympathy with the so-called "Massachusetts rule" which Professor Williston supports, devotes his attention mainly to the effort to show that of the twelve states which were cited as having adopted this view, only six are committed to it, and three of these by *dicta* only. Most of the cases cited by Professor Williston would, he declares, have been similarly decided in England.

It is apparent that so complete a disagreement as to the classification of cases, between such learned and careful investigators, must be based on different views as to the location of the boundary line on one side or the other of which a case is to be ranged. Professor Williston finds the real distinction taken by the English law to be that between executed and executory contracts, no rescission being allowed in any case of an executed sale. Professor Burdick, on the other hand, finds the English distinction to lie between conditions and collateral warranties, the purchaser being allowed to rescind even after acceptance of title for the breach of a condition.

Among "conditions" the Sale of Goods Act includes the implied engagement that the vendor has title, that goods ordered by description shall correspond with the description and be merchantable, etc., §§ 12, 13, 14. In nearly all of the cases in dispute the engagement fell within one of these classes, and, after acceptance of the title, rescission was allowed upon discovery of the defect. *Polhemus* v. *Heiman*, 45 Cal. 573. *Gale, etc., Manufacturing Co.* v. *Stark*, 45 Kan. 606. *Branson* v. *Turner*, 77 Mo. 489. When Professor Burdick says that these cases would be similarly decided in England, he must, it would seem, overlook or misinterpret § 11, (1), c, of the Sale of Goods Act, which provides that "where . . . the buyer has accepted the goods . . ., or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect." Exactly what would amount to an "implied term" in the contract, allowing rescission, it may be hard to say: but clearly such a term is not to be implied merely because there is a condition, for this would render the section absolutely meaningless. It is of course true that even in England the buyer has a reasonable time to examine the goods before accepting title. *Okell* v. *Smith*, 1 Stark. N. P. 107. See *Street* v. *Blay*, 2 B. & Ad. 456, 463. But surely there can be no ground for contention that the property had not passed in a case where the guano purchased had been put into the soil by the buyer, as in *Pacific, etc., Co.* v. *Mullen*, 66 Ala. 582. The other cases are only less clear. In practically all of the cases in question the language of the courts goes the full length, nor is a possible distinction between conditions and warranties anywhere adverted to.

Professor Burdick appears to find the basis of his view that the acceptance of title does not bar the right of rescission for breach of a condition in the leading case of *Street* v. *Blay*, *supra*. But certainly the decision in that case does not warrant it, for rescission was refused; nor is there anything in the opinion to indicate it. Lord Tenterden says the vendee "has no right . . . to return . . . unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel." It is very clear that this was intended to mean nothing more than "a term in the contract authorizing the return." And the cases cited by Lord Tenterden do not suggest the distinction. Professor Burdick's view has the support of Mr. Benjamin. BENJAMIN, SALES, 7th ed., § 887. But no decisions are cited in support of the author's statement. Whatever the English law has been in the past, it appears to be settled now by the Sale of Goods Act. But this only purported to codify the existing law. See also *Behn* v. *Burness*, 3 B. & S. 751, 755.

THE STOCKHOLDER'S RIGHT TO VOTE. — Since stability and permanence became recognized as essential to the management of large corporate enterprises, the commercial desire to attain these essentials has induced the making of voting trusts and stockholders' voting agreements. From the legal standpoint, these devices for control raise the most important questions concerning the nature of the stockholder's voting power and the stockholder's duty as regards voting. Upon the answer to these questions depend the vast financial arrangements attending the railroad reorganizations of recent years. The reluctance of the courts to adopt the commercial view and the uncertainty in which the decisions have left the question are set forth by Mr. Edward A. Harriman in an article on *Voting Trusts and Holding Companies*, 13 Yale L. J. 109 (Jan. 1904). Mr. Harriman urges that the stockholder's voting power is a property right which may be separated irrevocably from his legal as well as from his beneficial ownership; and that the stockholder may make any arrangement he wishes for the exercise of this property right, so long as he observes his duty not to deprive other stockholders of their substantial rights in the corporation.

So long as the stockholder votes in person, no "motives or promptings of what he considers his individual interest" can restrict his voting power. *Pender* v. *Lushington*, L. R. 6 Ch. D. 70, 90. But he owes the duty to the other stockholders, it is sometimes said, to express and exercise his judgment in respect to the affairs of the corporation. *Harvey* v. *Linville Improvement Co.*, 118 N. C. 693. This alleged duty, it seems, is the basis of the oft-repeated maxim that "an untrammelled right to vote shall be incident to the ownership of the stock." *Shepang Voting Trust Cases*, 60 Conn. 553, 576. How far these statements of the duty of the stockholder and the nature of his voting power are borne out by the cases may best be seen in the decisions upon three classes of voting arrangements: first, contracts between stockholders to vote their stock as a unit for the policy directed by a majority of their number; second, contracts between stockholders by which proxies, not accompanied by the transfer of stock on the books of the corporation, are given to trustees who may vote as they determine; third, contracts between stockholders by which their stock is transferred on the books of the corporation to trustees, who pay over the dividends to the transferring stockholders but vote the stock as they themselves determine. The first sort of arrangement is generally held legal, but the opinion is freely expressed that it is revocable. *Fauld* v. *Yates*, 57 Ill. 416. In one jurisdiction such an agreement has been held irrevocable. *Smith* v. *San Francisco, etc., Ry. Co.*, 115 Cal. 584. On the other hand, in reviewing an arrangement of this sort the purpose of which was fraudulent, one trial court has declared all such agreements illegal. *Cone* v. *Russell*, 48 N. J. Eq. 208. But see *Chapman* v. *Bates*, 61 N. J. Eq. 658. The second sort of arrangement has been generally held legal, but the implication is strong that it is always revocable. *Brown* v. *Pacific Mail, etc., Co.*, 5 Blatchf. (U. S. C. C.) 525. One jurisdiction, indeed, has held such an agreement irrevocable. *Mobile, etc., R. R. Co.* v. *Nicholas*, 98 Ala. 92. Another, in the

instance of such an arrangement which was fraudulent in its inception, has declared all such agreements illegal. *Shepang Voting Trust Cases*, *supra*. The third sort of arrangement, consistently with the foregoing decisions, has been held legal and irrevocable. *Chapman* v. *Bates*, *supra*. A squarely contrary decision, however, has been reached by another court. *Harvey* v. *Linville Improvement Co.*, 118 N. C. 693.

In this state of the authorities, generalization upon the nature of the stockholder's voting power and the stockholder's duty as regards voting must be hazardous. The notion that the stockholder owes the duty to the other stockholders to express his personal judgment in respect to the control of the corporation, it is submitted, is contrary to principle, and has been properly repudiated. The voting power, it seems, is not, as Mr. Harriman contends, a property right capable of being irrevocably separated from the legal ownership, but is a right incident to the legal title of the shares, and, like the legal title, capable of being irrevocably separated from the beneficial ownership: a right which, subject to revocation, may be delegated by proxy to an agent, but which cannot be irrevocably alienated from the legal title. This view seems most convenient for the corporation, which need not inquire into the beneficial ownership, but may safely admit the registered holder's vote. It makes practicable a device for attaining legitimate permanence in corporate management, without closing the opportunity for attacking fraudulent combinations. Finally, although opposed by several decisions and many *dicta*, it seems in accord with the weight of authority.

Liability of Telegraph Companies. — No legal problems are of greater interest, or of more practical importance, than those arising from the application of existing law to new circumstances, and among these one which has been the subject of protracted conflict, and still remains without solution, is the liability of telegraph companies for the negligent transmission of messages. The two most difficult questions which arise are in regard to the right of the sendee, (1) to maintain an action, (2) to recover for mental suffering.

A recent text writer in an elaborate and careful article seeks to answer these questions in the affirmative. *Liability of Telegraph Companies*, by Morris Wolf, 42 Am. L. Reg. 715 (Dec. 1903). After showing that the English courts never allow the sendee to recover, the writer takes up the various theories upon which recovery has been permitted in this country. Of these, two are worthy of careful attention. Many jurisdictions allow the sendee to sue as the beneficiary of the contract between the sender and the company, while others permit recovery in tort on the general ground of negligence. The first theory, as Mr. Wolf indicates, must be very limited in its application, since a sendee is often injured where the contract was not really made for his benefit. The impracticability of doing justice upon this ground is shown by the decisions of Texas, the most prominent advocate of this theory, which seem to justify the author's suggestion that the courts of that jurisdiction have held these contracts to be for the benefit of the sender or sendee according to which party first brought suit. *Cf. Western Union Teleg. Co.* v. *Adams*, 75 Tex. 531, and *Potts* v. *Western Union Teleg. Co.*, 82 Tex. 545. Moreover, it is well settled that recovery for mental anguish will not be allowed in a contract action, and the Texas cases in allowing such damages have reached that result through the aid of the Texas code, which abolishes distinctions between actions in tort and contract. As regards the second theory, Mr. Wolf would agree with those jurisdictions which allow recovery in tort for substantial damage, but he considers this principle also inadequate to cover cases where the only damage is mental. To meet this last class of cases he proposes a third theory based upon the suggestion that a telegraph company, as a public servant, owes to every member of the community a duty to do its work carefully.

The writer is to be complimented on his thorough collection and careful analysis of the cases, but his conclusions seem open to criticism. To allow recovery against the company on the basis suggested, presents two difficulties.

First, it seems doubtful whether the duty of a public servant is as extensive as is suggested by the writer. A public service company differs from other companies only in the fact that it must do business, at a uniform and reasonable rate, with any person who presents himself. Other than this it is not obvious that its liability extends beyond that of ordinary companies. Accordingly a consignee, in a case where title remained in the consignor, has been denied recovery against a carrier of goods. *Ogden* v. *Coddington*, 2 E. D. Smith's Rep. (N. Y.) 317, 327. Secondly, granted that the company owes a public duty, any one suing for a breach thereof must show special damage. Where damage is required to establish a cause of action, as would seem the case here, mental suffering is not such damage as the court should regard. *Wyman* v. *Leavitt*, 71 Me. 227; *Davies* v. *Solomon*, L. R. 7 Q. B. 112. The doctrine finds some slight support. *Mentzer* v. *Western Union Teleg. Co.*, 93 Ia. 752. But, however beneficial its application might be, it seems a complete innovation, rather than existing law applied to new circumstances. As such it is a matter for the legislature rather than the courts, and an examination of the subject leads to the belief that while existing law makes recovery possible in certain instances, uniform relief for the sendee must come by statute. *Western Union Teleg. Co.* v. *Ferguson*, 157 Ind. 37.

Stare Decisis. — Although the doctrine of *stare decisis* is everywhere recognized by the courts, a great deal of confusion exists as to the occasion and extent of its application. An attempt is made in a recent article to state the proper limitations of the doctrine as applied in the United States. *The Doctrine of Stare Decisis — Its Application to Decisions Involving Constitutional Interpretation*, by William J. Shroder, 58 Central L. J. 23 (Jan. 8, 1904). The writer asserts at the outset that the rule, which under certain conditions makes the decisions of courts binding as precedents, is one of public policy based on the advantages of stability in the law. It was by reason of such a rule in the Roman law that the "decreta" and "rescripta" of the Emperor in particular cases were conclusive for all similar cases. The binding force of the precedent was assumed very early in the English law, and decisions of the House of Lords are now binding not only upon all inferior tribunals, but also upon that body itself. In considering the American doctrine of *stare decisis* the writer finds that its limitations are of two kinds, internal, or those which determine when a decision is binding as a precedent, and external, or those which determine to what extent a precedent is binding. The former, as stated, are that there must be (1) a deliberate and solemn decision, (2) made after argument, (3) on a question necessary to the determination of the case. Such a decision is a binding precedent in (4) the same court, (5) in inferior courts, (6) where the very point is again in controversy. Two external limitations are noted to the effect that a precedent is not binding, (1) when the decision is manifestly incorrect in statement or application, or (2) when the decision, although correct at the time of utterance, is rendered unsatisfactory by change of conditions. The second will be found to qualify the first where, for example, such property interests have been acquired under an incorrect statement of the law as to render a change inexpedient. Mr. Shroder's conclusion is that the rule of *stare decisis*, so limited, has the same application to constitutional decisions as to those involving private right.

The Negotiable Instruments Law. — In the Michigan Law Review for January, Mr. Amasa M. Eaton recounts at length the history of this law and reviews the extended discussion to which it has given rise. 2 Mich. L. Rev. 260. The article is particularly timely since the Negotiable Instruments Law is at present before the Michigan Legislature. Commencing with the birth of the American Bar Association in 1878, the writer traces step by step the develop-

ments which finally led to the drafting of the bill in 1895, by Mr. John J. Crawford. The Negotiable Instruments Law has now been adopted in twenty-one States, one Territory, and the District of Columbia.

The first criticism of the law was published by Dean Ames in the HARVARD LAW REVIEW for December, 1900. This was the beginning of a long and active controversy with Dean Ames upon one side and Judge Brewster, Mr. Farrell, and Mr. McKeehan upon the other. Mr. Eaton, himself a strong advocate of the law, takes up the various sections of the bill which have met with the disapproval of Dean Ames, and states briefly the arguments advanced by both sides.

The last portion of Mr. Eaton's article consists of a summary of the forty-two decisions which have arisen under the law, many of which did not even reach the courts of last resort. And an examination of these cases would lead one quickly to the conclusion that "it has become quite the fashion to require the courts to construe statutes which to the average lay mind seem to require no construction."

The substantial defects in the Negotiable Instruments Law, considering the magnitude of the field covered, seem to be few. It is hoped that the article by Mr. Eaton will serve to make the advantages of the law more apparent to the legal profession of those states which have not yet adopted it.

ADMIRALTY JURISDICTION OVER STATE CANALS. *Anon.* 58 Central L. J. 21.

BURDEN OF PROOF IN CIVIL ACTIONS. *R. W. Winston.* 1 North Carolina J. of L. 6.

CHANGES WROUGHT BY THE NEGOTIABLE INSTRUMENTS LAW. *Samuel F. Mordecai.* Discussing changes effected in North Carolina. 1 North Carolina J. of L. 14.

CODIFICATION OF MERCANTILE LAW. *M. D. Chalmers.* 1 Commonwealth L. Rev. 79.

COMMONWEALTH LEGISLATION AND JUDICIAL INTERPRETATION. *John Quick.* 1 Commonwealth L. Rev. 62.

COMPENSATION FOR LAYING SEWERS AND PIPES. *Anon.* 67 Justice of P. 614.

CONFESSIONS IN CRIMINAL LAW. *S. M. T.* Discussing Indian cases. 5 Bombay L. Rep. 199.

CONSTITUTIONAL PROVISIONS GUARANTEEING FREEDOM OF THE PRESS IN PENNSYLVANIA. *Thomas Raeburn White.* 52 Am. L. Reg. 1.

CONTEMPT OF COURT. *John F. Geeting.* 36 Chic. L. News 176.

CONVERSION OF THE DEBT OF A CHILD INTO AN ADVANCEMENT BY THE PARENT. *Walter J. Lotz.* 58 Central L. J. 42.

CONVEYANCING AND EQUITY CASES. *Anon.* Review of the English decisions of 1903. 39 Law J. 31.

COVENANTS AS TO USES. *Anon.* 37 Irish L. T. 537.

CRIMINAL APPEALS AT COMMON LAW. *Charles Morse.* 40 Can. L. J. 19.

DAMAGES IN LIEU OF INJUNCTION. *Anon.* 37 Irish L. T. 545.

DISTRIBUTION OF PERSONAL ESTATES OF MARRIED WOMEN DYING INTESTATE. *Emilie M. Bullowa.* Criticising the present state of law in New York. 66 Albany L. J. 11.

DOCTRINE OF STARE DECISIS. *William J. Shroder.* 58 Central L. J. 23. See *supra.*

EXPANSION OF THE COMMON LAW. PART II. *Frederick Pollock.* One of a series of lectures delivered in this country. 4 Columbia L. Rev. 12.

EXPEDIENCY OF FEDERAL CONTROL OF CORPORATIONS. *Chas. Quarels.* 19 Chic. L. J. 739.

"FAIR COMMENT." *Anon.* 38 Irish L. T. 41.

FOREIGN RECEIVERS: THEIR DUTIES, POWERS AND LIABILITIES. *Anon.* 58 Central L. J. 4.

HISTORY AND THEORY OF THE LAW OF DEFAMATION. PART II. *Van Vechten Veeder.* 4 Columbia L. Rev. 33.

HOW FAR SHALL THE JUSTICE AND RIGHTS OF THE PARTICULAR CAUSE PREVAIL OVER A STRICT APPLICATION OF ESTABLISHED RULES OF LAW? *C. La Rue Munson.* 13 Yale L. J. 124.

JUDICIAL POWER OF THE COMMONWEALTH. PART I. *T. R. Bavin.* 1 Commonwealth L. Rev. 49.

LEGALITY OF CONTRACTS AFFECTING THE JURISDICTION OF COURTS. *Glenda Burke Slaymaker.* 58 Central L. J. 64.

LIABILITY OF ANY BUT LICENSED MEDICAL PRACTITIONERS FOR INJURIES RESULTING FROM THEIR ATTENTIONS UPON THE SICK. *Anon.* 58 Central L. J. 61.

LIABILITY OF SUBSCRIBERS ON STOCK SUBSCRIPTIONS. *Glenda Burke Slaymaker.* 66 Albany L. J. 4.

LIABILITY OF TELEGRAPH COMPANIES. *Morris Wolf.* 51 Am. L. Reg. 715. See *supra.*

LIABILITY OF THE GOVERNMENT FOR THE USE OF PATENTED INVENTIONS. *Charles C. Binney.* 52 Am. L. Reg. 22.

MISSOURI SUPREME COURT AND THE BRIBERS. *Anon.* 7 Lawgiver 28.

MR. JEFFERSON AND CHIEF JUSTICE MARSHALL. Publishing a letter from Mr. Jefferson to Judge William Johnson, in which the former expresses his views on *Cohens* v. *Virginia* and *Marbury* v. *Madison.* 9 Va. L. Reg. 689.

NORTHERN SECURITIES CASE. *Anon.* 7 Lawgiver 26.

NOTABLE DECISIONS OF THE JUDICIAL YEAR. *Anon.* 37 Irish L. T. 534.

NUMERALS AND LETTERS IN CONNECTION WITH ARTICLES OF COMMERCE. *Bernard C. Steiner.* Discussing trade-mark protection. 13 Yale L. J. 140.

PRACTICE AS TO COSTS OF PAUPER LITIGANTS IN ENGLAND. *Anon.* 13 Madras L. J. 259.

PROPERTY IN PHOTOGRAPH. *Anon.* Discussing the question with reference to the Victorian Act. 25 Australian L. T. 99.

RECENT CASES ON GENERAL AVERAGE AND INSURANCE. *N. W. Sibley.* 26 L. Stud. J. 12.

RESCISSION FOR BREACH OF WARRANTY. *Francis M. Burdick.* 4 Columbia L. Rev. 1. See *supra.*

RIGHTS OF EMPLOYEES AGAINST EMPLOYERS' BLACKLISTS. *Rupert Sargent Holland.* 51 Am. L. Reg. 803.

SOME CONSTITUTIONAL OPINIONS OF THE LATE MR. JUSTICE GWYNNE. *George Martin Rae.* 24 Can. L. T. 1.

SUPREME COURT OF THE UNITED STATES DURING THE FIRST HALF CENTURY OF ITS EXISTENCE. PART II. *A. Inglis Clark.* 1 Commonwealth L. Rev. 69.

TREND OF LITIGATION AND COSTS. *Wolfe Fink.* Discussing costs in Australia. 1 Commonwealth L. Rev. 59.

VOTING TRUSTS AND HOLDING COMPANIES. *Edward Avery Harriman.* 13 Yale L. J. 109. See *supra.*

WHETHER INSECTS ARE FERÆ NATURÆ OR DOMESTIC ANIMALS WITHIN THE STATUTE AGAINST CRUELTY TO ANIMALS. *Anon.* 58 Central L. J. 41.

WOMAN'S LEGAL STATUS IN ANCIENT AND MODERN TIMES. *James Fluegel.* 25 Australian L. T. 102.

II. BOOK REVIEWS.

THE LAW OF CONTRACTS. By Theophilus Parsons. Ninth Edition. By John M. Gould. Boston: Little, Brown & Company. 1904. 3 vols. pp. cccvii, 646; xx, 974; x. 749. 8vo.

The preparation of a new edition of Parsons on Contracts is an undertaking that might well put a brave editor in fear. Professor Parsons included under the title of this book not only branches of contract law ordinarily dealt with in separate treatises — such as bills and notes, partnership, sales, bailments, insurance, suretyship, and damages, but also topics which have very slight relation to contract law, such as shipping and admiralty, liens, bankruptcy, patents, copyrights, trademarks, and contributory negligence. It is no longer possible to treat in detail, with full citation of authorities, so many subjects in three volumes of moderate size. Moreover, such treatment could not now be attempted without taking greater liberties with the original text than would be justifiable in re-editing a book so widely known and so frequently cited as the one under consideration. It is but fair, therefore, to have in mind, in passing judgment on the new edition, the difficulties besetting the editor. It is a desirable thing to have this new edition, and it is unreasonable to cavil because the editor has not achieved the impossible. It is by what has been done, not by what has been omitted, that the edition must be judged, for in a book of such vast scope it is out of the question to have a new and complete note on every difficult problem suggested by the text or the notes of previous editors.

Mr. Gould has retained substantially intact the notes of the editor of the eighth edition, and also such notes of the editor of the seventh edition as were retained in the eighth edition. He has necessarily shortened the long notes of the earlier editions by omitting many of the long quotations and statements of cases which formed so noticeable a feature of the book. His own additions are almost wholly in separate notes, even when consisting merely of additional citations in support of a proposition in the text. This method enables the reader to determine readily whether a given annotation was added during the life of Professor Parsons or subsequently. On the other hand there is an unavoidable cumbrousness in several sets of notes on the same topic.

A great deal of work has evidently gone into the preparation of the new annotations. A thorough revision of the collections of state statutes relating to interest and usury and to married women has been made, and the citation of the latest decisions shows that the digests for the last ten years have been carefully examined. About six thousand new cases have been cited. So far as we have been able to examine the cases cited, they are pertinent. We regret that the editor has not more often cast his notes in the form of a systematic treatment of a special point instead of merely summarizing a number of cases, not always closely related, and we have noticed a few instances where he has stated cases really opposite in principle as if both were law.

The outward appearance of the book conforms to the high standard in this matter of its printers and publishers. S. W.

HANDBOOK OF THE LAW OF WILLS. By George E. Gardner. St. Paul, Minn.: West Publishing Co. 1903. pp. xv, 726.

This book is the latest addition to the well-known Hornbook Series. In form, scope and general character, it follows the general lines of its predecessors. Also like most of the former publications, it purports to be but a general outline and working manual of its subject. As such the volume furnishes an excellent survey of the whole subject of the law of wills, covering, in some form at least, nearly every related topic. The discussion of the difficult matter of construction occupies a considerable proportion of the work and touches upon many important questions. The usual Hornbook form of black-letter texts and careful paragraphing contributes largely to the clearness of the analysis and the general accessibility of the material. The language, however, is at times rather crude, and the sentences occasionally unwieldy or poorly constructed.

To the student this volume should be particularly useful in giving a concise and comprehensive grasp of the subject. To the practitioner it will be serviceable as a general handbook, and with its numerous citations will furnish an excellent starting point for the study of any particular topic. But like its companion volumes, this book cannot take the place of the more detailed discussions to be found in more extensive works or in those devoted to narrower topics. The six pages, for example, devoted to the Rule against Perpetuities is a helpful summary, but the careful investigator must refer back to the treatise of Gray for any real assistance in solving his problems.

As writer and publisher continue to send forth so many of these handbooks and summary discussions, it is earnestly to be hoped that they will not neglect the full and detailed treatment of the many narrower divisions of the law which have never yet received adequate consideration, for it is such works as the latter that are to be the really helpful law books of the future. The general principles have for the most part been well settled. It is upon the more unusual and less familiar points that we need new light and intelligent criticism. Thus, though we welcome the Hornbooks, we wish that the energy expended upon them might be confined within narrower bounds and be directed upon this more important field. We should then hope to receive much more really creative work in the line of legal scholarship. W. H. H.

FIRE INSURANCE as a Valid Contract in Event of Fire and as Affected by Construction and Waiver, Estoppel, and Adjustment of Claims thereunder. By George A. Clement. New York: Baker, Voorhis & Company. 1903. pp. xcviii, 637. 8vo.

Insurance falls into two nearly equal parts. One of these has to do with validity. The other assumes that the contract is valid, and then deals with the questions whether there has been a loss, what steps should precede recovery, what should be the amounts, and whether there should be subrogation; or else it assumes that the contract was voidable, or that there has been some defect in the proceedings after loss, and then asks whether the defense has not been removed by waiver or estoppel.

The former half of the subject is the one to which most treatises give earlier and larger attention. Mr. Clement, however, has devoted his pages almost wholly to the latter half. The result is in effect a supplement to the ordinary books. Further, the book is a welcome addition to the already voluminous literature of the subject for the reason that it gives a distinctly practical treatment — in truth, a treatment from the point of view of an adjuster rather than from the point of view of the lawyer. There are, of course, drawbacks incident to such a treatment. The chief of these is that there can be little discussion, — in fact, this book is thrown into the form of short rules, — and another is that attention is almost wholly given to the very words of standard policies. One example must suffice. The first rule is: "The company shall not be liable for loss caused by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises." The author's comment is simply that this is the duty prescribed by the standard forms of certain named states. If the work were not purely practical, here would be a place for elaborate discussion. It remains to add that most of the rules are annotated with adequate but not exhaustive citations of cases, and that there are valuable discussions and illustrations of the mode of determining the amount and apportionment of loss.

THE ORGANIZATION AND CONTROL OF INDUSTRIAL CORPORATIONS. By Frank Edward Horack. Philadelphia: C. F. Taylor. 1903. pp. 207. 8vo.

This number of the Equity Series attempts to demonstrate that the effective solution of the corporation problem, as it exists at the present time, is possible only through the federal government. The keynote of this contention is the foreign corporation. The author has carefully compiled the statutory and constitutional provisions of the various states as to association and publicity, showing in detail their lack of uniformity. The ability of corporations to conduct business in other states has led some of the states, for the purposes of revenue, to enact very liberal laws of incorporation in order to induce the organization of corporations under their laws. The result has been that, while a state has the power, for the protection of its citizens, to define absolutely the conditions upon the creation of its corporations, those corporations organized in other states, operating under the protection of interstate commerce, are able to set at naught the policy of the state. The author, therefore, maintains that the problem resolves itself into the "foreign corporation problem." Actual publicity in the organization of corporations to protect the public is shown not to be required by the existing state laws. The author states his own conclusion as to what is necessary to secure that result, and submits that its adoption by the federal government in its supervision of those corporations within its powers would make it possible for each state to effect a policy of its own without interference.

The presentation of the volume in the Equity Series makes it available to every one. While the book is not free from typographical errors, in the main it is adapted to easy reading, and is well worth perusal.

CITIZENSHIP OF THE UNITED STATES. By Frederick Van Dyne. Rochester: The Lawyers Co-operative Publishing Co. 1904. pp. xxvii, 385. 8vo.

On a subject so rarely treated and yet so important as citizenship a new text-book is most welcome. In this work the author deals only with the acquisition and loss of federal citizenship. He has made a most exhaustive collection of the authorities, and arranged them in logical and convenient form. In several ways, however, the book might be improved. It is made up largely of quotations from different cases and from the opinions of attorney-generals. The form is seriously impaired by the fact that the citations are put in the text. In several instances the author has merely combined several quotations without drawing from them the points of law for which they stand. This is often confusing, particularly when they seem inconsistent. For instance, his treatment of knowledge of the Constitution as a prerequisite to naturalization consists of extracts from four authorities, one of which seems totally inconsistent with the others. Another fault often serious is quotation at great length with infrequent summaries. As a result, one is often forced to read many pages to reach a conclusion which could much better have been brought out in the author's own words in a single page. In this way the treatment of the status of the inhabitants of Porto Rico and the Philippine Islands suffers considerably.

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by William Mack and Howard P. Nash. Vol. IX. New York: The American Law Book Co. London: Butterworth & Co. 1903. pp. 998. 4to.

The main articles in this volume, which treats of the subjects from Contempt to Corporation Court, are those on Contempt, Contracts, and Copyright. The title Contracts, by Mr. John D. Lawson, embraces more than half the volume, and is a very good illustration of the method which distinguishes this work from the similar American and English Encyclopædia of Law. Here all subordinate subjects, as Consideration, Fraud and Mistake, Duress, Illegality, etc., are treated under the head of Contracts, and are made accessible by the exhaustive and logical summary, as well as by numerous cross references. The policy of the American and English Encyclopædia, on the other hand, is to treat such subjects under their own names, with cross references. This would seem slightly more convenient for actual use, but may be offset by the greater unity of the present method.

The text is more voluminous than is usual in such a work, and seems in the main accurate. The citations are numerous, and in general comprehensive. Only actual use, however, can determine the practical value of such a publication.

CYCLOPEDIA OF LAW AND PROCEDURE. Annual Annotations, covering the subjects embraced by the first nine volumes. Edited by William Mack and Howard P. Nash. New York: The American Law Book Company. London: Butterworth & Co. 1904. pp. 474. 4to.

A TEXT-BOOK OF LEGAL MEDICINE AND TOXICOLOGY. Edited by Frederick Peterson and Walter S. Haines. In two volumes. Vol. II. Philadelphia, New York, and London: W. B. Saunders & Company. 1904. pp. 825. 8vo.

A TREATISE ON STOCKS AND STOCKHOLDERS, covering Watered Stock, Trusts, Consolidations, and Holding Companies. By Arthur L. Helliwell. St. Paul: Keefe-Davidson Company. 1903. pp. xxxiii, 1071. 8vo.

AN AMERICAN CHANCELLOR. An address delivered by Charles B. Elliot at the Law School of Yale University, March 25, 1903. Indianapolis: The Bobbs-Merrill Company. 1903. pp. 30. 8vo.

THE AMERICAN LAW OF LANDLORD AND TENANT. By John N. Taylor. Ninth Edition. Revised by Henry F. Buswell. In two volumes. Boston: Little, Brown & Company. 1904. pp. cxv, 541; xv, 592. 8vo.

AN INTRODUCTION TO PRACTICE, with special reference to the New York Code of Civil Procedure. By George A. Miller. New York: Leslie J. Tompkins. 1903. pp. xiv, 284. 8vo.

THE ORIGIN AND DEVELOPMENT OF THE LEGAL PROFESSION. By Charles S. Wheeler. Address delivered at Stanford University, May 21, 1903. San Francisco: The Murdock Press. 1903. pp. 49. 8vo.

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by William Mack and Howard P. Nash. Vol. X. New York: The American Law Book Company. London: Butterworth & Co. 1904. pp. 1370. 4to.

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FORGED TRANSFERS OF STOCK AND THE SHEFFIELD CASE.

IN two recent cases the question has come before the English courts whether a corporation that has been induced to register a forged transfer of stock, or to allow a transfer of stock on its books under a forged power of attorney, is entitled to indemnity from the person that has induced it to do so, when he has acted in good faith and in the belief that the document was genuine. In one it was held that the person who induced the corporation to allow him to transfer the stock under the forged power of attorney thereby represented that he had authority to make the transfer, and that this representation imported a contract that the authority under which he acted was valid, and made him answerable for the damages sustained by the corporation. In the other it was held that the person who in similar circumstances induced the corporation to register the forged transfer made no representation or contract that the document was genuine and was not bound to indemnify the corporation.

The former of these cases was Starkey *v.* Bank of England,[1] in which the House of Lords affirmed the decisions of the Court of Appeal and Kekewich, J., in the same case, *sub nom.* Oliver *v.* Bank of England.[2] In this case government stock was standing

[1] [1903] A. C. 114.

[2] [1902] 1 Ch. 610; [1901] 1 Ch. 652.

in the books of the bank in the names of F. W. Oliver and his brother Edgar, who were trustees for others. Starkey and his partner, who were stockbrokers, received from F. W. Oliver instructions to sell the stock and a power of attorney to transfer it executed by him and purporting to be executed by his brother. The form of power of attorney had been obtained from the bank upon an application in the names of F. W. and Edgar Oliver, and the bank before issuing it had sent notices to them, in accordance with a practice usual in England, that it had been applied for, but no notice ever reached Edgar Oliver. The brokers, believing that the power of attorney was genuine, sold the stock, and Starkey presented the power of attorney to the bank, and on his request to act under it was allowed by the bank to transfer the stock to the purchasers. A year and a half afterwards F. W. Oliver died, and it was then discovered that Edgar Oliver's signature to the power of attorney was a forgery. He brought an action against the bank for restitution, and Starkey was made a third party upon a claim by the bank for indemnity. It was held that Starkey, in presenting the power of attorney to the bank and demanding to act under it, represented that he had the authority that he assumed to exercise, and, the bank having in consequence of his request transferred the stock, a warranty was implied that he had that authority, according to the rule established in Collen *v.* Wright.[1]

The other of the two cases was Sheffield Corporation *v.* Barclay,[2] in which the Court of Appeal reversed the decision of Lord Alverstone, C. J.[3] Stock of the corporation of Sheffield, which was transferable in the same way as the shares of companies, was standing in the names of two trustees, named Timbrell and Honnywill. In 1893, under the instructions of Timbrell, some stockbrokers sold it, and at the request of the purchasers a transfer to E. E. Barclay as representative of Barclay & Co., purporting to be executed by Timbrell and Honnywill, was delivered to Barclay & Co., who made advances to the purchasers on the security of the stock. Barclay & Co. sent the transfer to the registrar of the corporation with a letter requesting him to register it in the corporation's books in the name of E. E. Barclay and to send them the new certificates. Notices of the proposed transfer were sent to Timbrell and Honny-

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[1] 7 E. & B. 301; 8 E. & B. 647.
[2] [1903] 2 K. B. 580.
[3] [1903] 1 K. B. 1.

will by the corporation, but no reply was received from either of them. Accordingly E. E. Barclay was registered as holder of the stock and a new certificate was issued. E. E. Barclay afterwards executed transfers on the sale of the stock and the new purchasers were registered as holders. Timbrell died a few years after, and in 1901, it having been discovered that Honnywill's signature was a forgery, the corporation was obliged to replace the stock. The corporation then brought an action against E. E. Barclay and Barclay & Co. for indemnity against the loss it had suffered.

Lord Alverstone, C. J., held [1] that the defendants were liable, according to the rule, stated by Tindal, C. J., in Toplis *v.* Grane,[2] that "where an act has been done by the plaintiff under the express directions of the defendant, which occasions an injury to the rights of third persons, yet if such act is not apparently illegal in itself, but is done honestly and *bona fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof." [3]

This decision was reversed by the Court of Appeal (Vaughan Williams, Romer, and Stirling, L. JJ.) [4] for reasons that will be best shown by extracts from the judgments. Romer, L. J., said: [5]

"This is not the case where a person, having no independent duty or obligation to do a particular act, does that act at the request and for the purposes of another. In such a case, if the act is one not known by him at the time to be illegal, but is one that turns out to be wrongful, the person doing the act may make the person requesting it indemnify him under an implied contract. But in the present case it was the interest of the corporation itself to keep the register of stockholders and issue certificates, and the corporation was bound to keep the register correctly. . . . The corporation did not act voluntarily on the request for registration made by the defendants. It acted because of the duty cast upon it, and (partly, at any rate) for its own purposes. When it received the transfer it had a duty or obligation cast upon it, as between itself and the transferor, to see that the transfer was really the act of the transferor. Accordingly the corporation took such steps as seemed to it sufficient to satisfy itself that the transfer was genuine. It compared the signature of the transferor in its possession with the signature to the transfer, and sent notice to the transferor that it was going to act on the transfer if no objection was taken by him. In fact,

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[1] [1903] 1 K. B. 1.
[2] 5 Bing. N. C. 636, 650.
[3] See also Dugdale *v.* Lovering, L. R. 10 C. P. 196.
[4] [1903] 2 K. B. 580.
[5] P. 594.

the corporation judged and acted for itself in dealing with the transfer, and did not act merely on the request of the defendants." [After pointing out that it could not have been assumed that the transferee of stock had personally the means of seeing or ought to have seen the actual execution of the transfer, he continued:] "This being so, it appears to me that all that could be assumed by the corporation as against the transferee sending in the transfer for registration was that the transferee had taken reasonable care in the matter, and had reasonable ground for believing and did believe that the transfer, which, on the face of it, purported to be executed by the transferor, was, in fact, so executed. No representation could, in my opinion, be implied, under the circumstances, against the transferee beyond what the corporation was entitled to assume against him as above stated. I think therefore that no warranty of the execution of the transfer by the transferor ought to be implied as between the transferee and the corporation."

Vaughan Williams, L. J., delivered judgment to a similar effect, and Stirling, L. J., said: [1]

"Now the mere performance of a duty imposed by law on any one holding a definite legal position does not constitute a consideration sufficient to support a promise to him by the person to whom the duty is owed. If however the person who owes the duty departs at the request of him to whom it is due from the strict legal course of performance of that duty or puts himself in a different position from that created by law, then a consideration may arise for a promise express or implied. This is illustrated by the cases relating to the indemnity of sheriffs, which were much relied on in the argument on behalf of the plaintiff. . . . In Humphrys *v.* Pratt,[2] a sheriff, who had at the request of the execution creditor seized particular goods, was held by the House of Lords to be entitled to an indemnity, although not expressly agreed to by the execution creditor. There is, unfortunately, no report of what was said by the noble and learned lords who advised the House; but in Collins *v.* Evans,[3] the *ratio decidendi* is explained by Tindal, C. J., in delivering the judgment of the Exchequer Chamber. If, then, the goods are simply pointed out to the sheriff and he is left to follow his discretion — that is, to take the legal course — he is not entitled to indemnity; but if he is required to seize them, he is. . . . In the present case the plaintiffs were under a statutory obligation to register transfers and issue certificates; the defendant called on them to perform their duty under the statute with regard to the transfer which he forwarded to them; and as it seems to me, he did nothing more. . . . It was suggested, though somewhat faintly, that the defendant warranted to the plaintiff the genuineness of the transfer. In my judgment the defendant did not give any such warranty."

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[1] P. 597. [2] 5 Bli. N. S. 154. [3] 5 Q. B. 830.

Both Romer and Stirling, L. JJ., mention that, if there was a warranty, it was broken at the time it was given, and the statute of limitations would be an answer to any claim under it.

It seems clear that, if a corporation registers a transfer of stock by a mistake not attributable to the person that requested it to do so, the corporation is not entitled to make that person answerable for the loss on the ground that the corporation did that act at his request. But a different question arises where the original mistake is that of the person presenting the transfer and he is thereby led to make an untrue representation which induces the corporation to register the transfer, and the only mistake of the corporation consists in not discovering his mistake and in acting on his representation, the same sources of information being open to both.

Instances of the former class are found in the cases where a person executes a transfer of shares that he has already transferred or never had any title to, and the company registers this transfer and issues a new certificate at the request of the transferee, who acts in good faith. In such a case the company will even be bound to indemnify the transferee if he changes his position on the faith of the certificate.[1] If he should sell the shares and the company should be compelled to pay damages to the purchasers because they had acted on the certificate, it is obvious that the company could not call on him for indemnity on the ground that it had done an act at his request that was not apparently wrongful but had resulted in injury to the rights of third persons. The reason would be that the loss had arisen entirely from a mistake of the company in conducting its own business, and was not caused by anything that the transferee had done. The transfer that he presented for registration was exactly what it purported to be, and in presenting it he made no representation that the transferor was the holder of the shares that it assumed to transfer. All the means of knowing whether the transferor was the holder of the shares or not were in the possession of the company, and in the ordinary course of business the company would refer to them before registering the transfer. The act of the transferee in presenting the transfer could not properly have induced the company to believe that the transferor was the holder of the shares.

The Sheffield Case is one of the second class of cases. Barclay &

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[1] Balkis Consolidated Co. *v.* Tomkinson, [1893] A. C. 396; [1891] 2 Q. B. 614; Dixon *v.* Kennaway & Co., [1900] 1 Ch. 833.

Co. had advanced money upon a forged transfer of stock and, in the belief that it was genuine, sent it to the corporation with a letter in which they said they enclosed the *transfer* and requested the corporation to *register the same*. This letter seems to contain a distinct representation that the document enclosed was a transfer (that is, a genuine transfer), and a request to register it.[1] The corporation registered the transfer in accordance with the request. The means of knowing certainly whether the signatures were genuine were not in the possession of the corporation, and, though that might have been ascertained by personal inquiry from the registered holders of the stock, it was not usual for the corporation in the ordinary course of business to make such inquiries, and that source of information was equally open to Barclay & Co. In these circumstances it was hardly open to Barclay & Co. to say that the corporation was not justified in acting on their representation, and that it ought, before registering the transfer, to have made inquiries that they themselves did not think it important to make before they advanced their money on the transfer or before they made the representation concerning it to the corporation. If it was not open to them to say that, then the corporation would seem to be entitled to an indemnity from Barclay & Co., on the ground that it had done an act at their request which appeared, according to their representation, to be legal and proper, but had since turned out to be wrongful.

The Court of Appeal however took a different view of the case. Vaughan Williams, L. J., intimated, by a question during the argument, that the transfer was delivered to the corporation that it might ascertain whether it was duly executed.[2] He cites Lord Field as saying, in Balkis Consolidated Co. *v.* Tomkinson,[3] that a purchaser sending in a transfer to the corporation makes no representation which might estop him as against the corporation;[4] but all that Lord Field said was that, in sending in the transfer, which in that case was duly executed as it purported to have been,

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[1] The letter was as follows: "54, Lombard Street, London, E. C., April 15, 1893. Messrs. Barclay, Bevan, Ransom & Co. present their compliments to the registrar of the Sheffield Corporation, and beg to send inclosed the *transfer* of 8200*l.* 3½ per cent. 1883 stock, and will be obliged by his *registering the same* in the company's books in the name of their Mr. E. E. Barclay, sending them the new certificates in due course. Messrs. Barclay & Co. also inclose the amount of the registration fee. The Registrar, Sheffield." [1903] 2 K. B. p. 581.

[2] [1903] 2 K. B. p. 584.

[3] [1893] A. C. p. 413.

[4] [1903] 2 K. B. p. 587.

they made no representation that the transferor was the registered holder of the shares, and he did not intimate that they did not represent that the transfer was genuine upon which they asked the company to act. Romer, L. J., said that the corporation judged and acted for itself in dealing with the transfer and did not act merely on the request of the defendants, and that no representation could, in his opinion, be implied beyond that the transferee had taken reasonable care and believed the transfer to be genuine.[1] Stirling, L. J., said that the defendants called on the corporation to perform its duty with regard to the transfer forwarded by them and did nothing more.[2] The letter with which the transfer was forwarded is not referred to, and these views regarding the representation that was made and what the defendants requested the corporation to do seem hardly consistent with the contents of the letter.

In *Starkey's* Case[3] both the Court of Appeal and the House of Lords seem to have taken a view of similar circumstances that is directly opposed to that taken by the Court of Appeal in the *Sheffield* Case. The circumstances of the two cases were the same in all material particulars, except that the document in the former case was a power of attorney and the transaction was effected by an entry by virtue of it in the books of the bank, while in the latter case the document was a deed of transfer and the transaction consisted in registering it in the books of the corporation. In Starkey's Case there is no suggestion that the bank had a duty to ascertain for itself whether the power of attorney was duly executed, or that it judged and acted for itself in dealing with the power of attorney, and not merely on the request of Starkey, or that no representation could be implied beyond one that he had taken reasonable care and was acting in good faith. The case proceeded on the ground that Starkey, in presenting the power of attorney to the bank and claiming to act under it, represented that he had the authority contained in it, and, as the bank was thereby induced to enter into a transaction with him in his professed character of agent, he warranted the truth of the representation. Vaughan Williams, L. J., said:[4] "The broker . . . produced this authority, and upon the production of it he demanded that the bank should perform their

[1] [1903] 2 K. B. p. 595. [2] *Ibid.* p. 598.

[3] Starkey *v.* Bank of England, [1903] A. C. 114; *sub nom.* Oliver *v.* Bankof England, [1902] 1 Ch. 610.

[4] [1902] 1 Ch p. 619.

statutory duty. . . . The Bank of England, acting on that demand, did, in pursuance of this power of attorney, perform their statutory duty by allowing the transfer of the stock." By "statutory duty" he plainly refers to what would have been their duty if the power of attorney had been genuine, and not to any supposed duty to find out whether it was genuine or not. He held the case to be governed by Collen *v.* Wright,[1] which he described as "a decision which is applicable to the case of a person who is professing to act as agent of another, and so makes a representation for the purpose of inducing a third person to act, as a matter of business, upon the faith of that representation." Stirling, L. J., in the same case[2] said that Starkey came to the bank with a document purporting to be signed by two stockholders, and made a demand to be allowed to exercise the powers the document purported to confer by transferring the stock to another person, and to that the bank acceded, the entry was made, and the transfer effected, and that this transaction was within the rule of that case. In the House of Lords, Lord Halsbury said[3] that it was impossible to doubt that the document was a representation of authority on the part of the two persons whose signatures purported to be appended, and the person who presented it and demanded to act upon it was himself asserting that he had that authority, and the result was that the bank transferred the stock when only one of the two persons had given the authority.

It was argued in the Court of Appeal in this case, as in the other, that the bank made its own inquiries and acted upon the result of those inquiries, and that Starkey kept back nothing and had no means of discovering the fraud.[4] But this argument found no favor, and in the House of Lords seems to have been abandoned. Stirling, L. J., said:[5]

"It was urged that, regard being had to the precautions which the Bank of England take in comparing the signatures to powers of attorney, and to other precautions they take for the purpose of ascertaining whether the powers which are presented to them really emanate from the principals to whom the stock belongs, a warranty ought not in this case to be implied. In my opinion, that contention is not well founded. It is not sufficient to show that the bank took precautions unless it is also shown that they relied on these precautions alone."

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[1] 8 E. & B. 647. [2] [1902] 1 Ch. p. 629. [3] [1903] A. C. p. 117.
[4] [1902] 1 Ch. p. 616. [5] *Ibid.* p. 630.

If Starkey made such a representation regarding the power of attorney when he presented it and demanded that the bank perform its statutory duty under it, it is difficult to understand why it is said in the Sheffield Case that Barclay & Co. did *not* represent the transfer to be what it purported to be when they presented it to the Sheffield Corporation with a request that it be registered, or why the Sheffield Corporation is said to have judged and acted for itself with regard to the transfer, while the Bank of England, which did the same things to ascertain that the power of attorney was genuine, is held to have been induced to make the transfer by Starkey's representation. If, in another case like Starkey's Case, the forgery of the power of attorney should remain undiscovered for six years, and, the warranty being then unenforceable, an action should be brought for indemnity on the same ground as in the Sheffield Case, a judgment for the defendant could not be supported by the same reasons that were given in the latter case without going contrary to the reasons given for the decision in the former case. If such an action could be maintained in that case, it would seem that the Sheffield Corporation ought also to have been successful in its action.

In the Sheffield Case, the Court of Appeal seem to have adopted the view regarding the duty of the corporation to ascertain the validity of the transfer that was announced in Simm *v.* Anglo-American Telegraph Co. by Lindley, J.,[1] who there said:

"And it appears to me that a duty is thrown on the company to look to their own register, which involves, of course, the looking after the transfer of stock or shares standing in the names of persons on the register; and that duty the company owe to those who come with transfers, and I do not see any corresponding or conflicting duty on the part of the person who brings the transfer, except, of course, that of bringing what he believes to be an honest document."

But in that case, on appeal, every judge of the Court of Appeal expressed his dissent from this view, and declared that the duty of the company regarding the register and transfers existed only for the benefit of the company itself and the then holder of the stock or shares.[2] Bramwell, L. J., said:[3]

"It has been argued . . . that the company were estopped because it was their duty to make inquiries, and because it must be taken against them

[1] 5 Q. B. D. p. 195.
[2] *Ibid.* p. 199, 203, 209, 214.
[3] P. 203.

that they were satisfied by the inquiries which they had instituted, and that they affirmed to Burge & Co. [for whom the plaintiffs were trustees,] not merely that Coates [whose signature was forged] had been a stockholder, but also that he had executed the instrument of transfer. I dissent entirely from that argument. I believe that the system of inquiry by companies before the registration of a transfer is modern: no doubt that it is a very reasonable and proper step for companies to take: nevertheless, as it seems to me, it is clearly a practice to which they have recourse for their own benefit, and not for the benefit of any one else; because, although there may be no estoppel between them and a person who brings transfers to them, there would be between them and his transferees."

Brett, L. J., said: [1]

"It is true that it is the course of business for the company to make inquiry of the person whose name is upon the register, but it seems to me that they are under no obligation to the person who sends the transfer to make that inquiry; it is obvious that they make it entirely for their own protection. I can see nothing which casts a duty upon them to make that inquiry on behalf of the alleged transferees; in truth the intending transferees, if they distrust the broker, can require to be informed of the name of the person whose stock is to be eventually transferred to them, and they can themselves make inquiry and ascertain from him whether the broker has his authority to transfer his stock."

Cotton, L. J., said: [2]

"The duty to the company is not to accept a forged transfer, and no duty to make inquiries exists towards the person bringing the transfer. It is merely an obligation upon the company to take care that they do not get into difficulties in consequence of their accepting a forged transfer, and it may be said to be an obligation towards the stockholder not to take the stock out of his name unless he has executed a transfer; but it is only a duty in this sense, that unless the company act upon a genuine transfer, they may be liable to the real stockholder. There being in my opinion no duty between Burge & Co. and the company to make inquiries, I think that there was no representation by the company to Burge & Co. that the transfer was genuine: as it seems to me, the action cannot be maintained on that ground. It is unnecessary to determine whether, if any representation had been made, Burge & Co. could be considered to have acted upon it."

According to the view expressed by Lindley, J., in that case and by the judges in the Sheffield Case, the plaintiffs in Simm's Case

[1] P. 209. [2] P. 214.

would have succeeded if Burge & Co. had acted on the certificate issued to them.

The rule, that a banker paying by mistake a forged cheque of a customer cannot recover back the money, is sometimes alluded to as applicable by analogy to a corporation registering a forged transfer of shares. But this rule, which is founded on Price *v.* Neal,[1] is an anomaly peculiar to the law of bills of exchange. It prevents the banker, at least in this country, from recovering back the money, even if the person receiving it has not changed his position, and the reason given for it in that case is that it was incumbent on the drawee to be satisfied that it was the drawer's signature before he accepted or paid the bill. But a corporation is not bound to know whether a power of attorney to transfer stock is in fact signed by a stockholder, as appears by Starkey's Case, and there is no reason why there should be any greater obligation to know his signature upon a transfer of stock.

There is one case in this country in which the question was decided whether a company could recover damages from a person who had induced it to register a transfer of shares under a forged power of attorney or a forged transfer, where he acted in good faith. In Boston & Albany Rld. Co. *v.* Richardson,[2] the defendants, having bought five railway shares, received from the broker a certificate for that number of shares standing in the name of another person, and a power of attorney to transfer the shares purporting to be signed by the shareholder, the signature being in fact a forgery. The power of attorney contained blanks for the names of the transferees and the attorney. The defendants filled in their own names as transferees and the name of their clerk as the attorney, and the clerk, acting as their agent, presented the certificate and power of attorney to the company and was allowed by it to transfer the shares on the books of the company to the defendants. On the back of the certificate was printed a form of transfer as set out below.[3] It may be observed that in this country shares in corporations are transferable either on the books of the corporation or by an instrument in writing (not under

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[1] 3 Burr. 1354; see United States Bank *v.* Bank of Georgia, 10 Wheat. p. 348–352; Dedham Bank *v.* Everett Bank, 177 Mass. 392.

[2] 135 Mass. 473.

[3] This form of transfer was as follows: "For value received the undersigned hereby transfers to —— of —— —— shares of the capital stock of the Boston & Albany Railroad Company. Dated at —— —— 18 ."

seal) which must be registered in its books, as the law of the state or the rules of the corporation may prescribe. But whichever mode of transfer is prescribed, a blank form of transfer or of power of attorney is commonly printed on the back of the certificate, and is generally, though not necessarily, used for the purpose. Even when the shares are transferable only on the books of the corporation, this instrument is commonly spoken of and regarded as a transfer.[1] The practice of sending notices to the registered shareholders before registering a transfer, or before allowing a transfer under a power of attorney, is unknown. In the case above mentioned the railway company, on discovery of the forgery, was obliged to replace the shares, and brought an action against the defendants for the damages sustained. The court held that the defendants were liable upon an implied warranty that they had the authority to make the transfer. This was what was held in Starkey's Case. The court also expressed an opinion that, if the form of transfer on the back of the certificate had been used with a forged signature, instead of the power of attorney, the result would have been the same, for in presenting it for registration the defendants would impliedly represent it as genuine and would be similarly liable upon an implied warranty. This is not going beyond the principle of the rule in Collen *v.* Wright, as stated by Brett, L. J., and adopted by the Court of Appeal in Starkey's Case,[2] viz., that "where a person either expressly or by his conduct invites another to negotiate with him upon the assertion that he is filling *a certain character*, and a contract is entered into upon that footing, he is liable to an action if he does not fill that character; but the liability arises, not from the misrepresentation alone, but from the invitation to act and from the acting in consequence of that invitation." Starkey's Case shows that this rule applies where the transaction entered into upon the invitation is not a contract but a transfer of stock. There does not seem to be any ground for a distinction between a case where the character in which one invites the other to enter into the transaction is that of a transferee of shares, and a case where the character is that of an agent to make a transfer. The transfer is itself an authority to register the transfer and does not give a complete title until it is registered. The decision in Boston & Albany Rld.

[1] The effect of such instruments signed in blank was considered in Colonial Bank *v.* Cady, 15 App. Cas. 267, 284; 38 Ch. D. 388.

[2] [1902] 1 Ch. p. 626.

Co. *v.* Richardson seems to have gone upon the same principles as these English cases as regards both points.

In the Sheffield Case, according to the reasoning in Starkey's Case, the corporation in registering the transfer acted upon the representation of Barclay & Co. that it was a transfer, and on their request that it be registered. The corporation thus departed from the strict legal course of performance of its duty, which was limited to registering genuine transfers, and in doing so violated the rights of others. It was not apparently illegal to register the transfer, and the corporation acted honestly and *bona fide* in complying with Barclay & Co's. request. If a sheriff had seized particular goods at the request of an execution creditor, he would clearly have had a right to be indemnified by the creditor. On the same principle it would seem that the corporation was entitled to be indemnified by Barclay & Co. It is submitted that the decision of Lord Alverstone, that the corporation was entitled to such indemnity, was right, and that the decision of the Court of Appeal reversing his decision was wrong.

J. L. Thorndike.

THE HAWAIIAN CASE.

FROM the time when the United States first acquired territory outside its boundaries as they existed when the constitution was adopted, difficulties have been encountered in the interpretation of that instrument with reference to the applicability of its provisions within such acquired territory. These difficulties have been the occasion of much discussion and difference of opinion in Congress and of many expressions of view in the Supreme Court of the United States. Since the acquisition of possessions beyond the limits of the North American Continent, the judges of that court have so radically differed in their views that it has been impossible for a majority of them to agree on the reasoning to be accepted in determining cases involving this question, and the decision of each particular case has been arrived at by a concurrence of a majority as to the particular result reached, by different processes of reasoning, while in each instance the correctness of that result has been questioned by a minority, so that it cannot be said that the principles to be followed in subsequent cases are settled by the rule of *stare decisis*. It is not usually profitable to discuss differences of opinion in a court on a question foreclosed by the statement of the majority of the judges as to the point decided, but it is not improper as to this question to continue the discussion until a more harmonious enunciation of the considerations which will control the court in future cases has been secured; and the recent decision of the court in the Hawaiian case furnishes an apt occasion for such further discussion.

The Hawaiian case[1] involved, to state it succinctly, the question whether the provisions of the Fifth and Sixth Amendments to the Federal Constitution, so far as they guarantee to a person accused of an infamous crime the right to be tried only on an indictment by a grand jury and the verdict of a common-law jury, rendering a unanimous verdict, were applicable to a criminal proceeding under the laws of the territory of Hawaii as they existed between the time of the annexation of the islands to the United States, in 1898, and the time when by act of Congress of April 30,

[1] Territory of Hawaii *v.* Mankichi, 23 Sup. Ct. Rep. 787, decided in June, 1903.

1900, the constitution of the United States was formally extended to those islands and provision was made for the indictment and trial of those accused of crime in accordance with the ordinary common-law methods. To be more specific as to the exact question involved and with reference to which judgment was rendered by the Supreme Court, the controversy was as to whether the defendant, who had been put on trial for manslaughter in accordance with the existing laws in the Hawaiian Islands without indictment by grand jury, and had been convicted on a verdict of a jury concurred in by less than the whole number of jurors, was entitled to be discharged on writ of *habeas corpus*. It was not contended that defendant was deprived of his liberty without due process of law, for the procedure was on information charging him with the specific crime, and the trial was in a judicial tribunal, and, if the proceedings had been in a state court and in accordance with provisions of the state constitution authorizing such form of charge and method of trial, it could not have been contended that defendant had been deprived by the state of his liberty without due process of law in violation of the familiar provisions of the Fourteenth Amendment. The contention was that the method of accusation and trial was not authorized by law; and that therefore the defendant was not lawfully detained in prison under such conviction.

The territorial government of Hawaii was created in pursuance of a joint resolution of Congress, of July 7, 1898,[1] known as the Newlands Resolution, by which it was declared that the islands were annexed "as a part of the territory of the United States, and subject to the sovereign dominion thereof," with the condition that, "The municipal legislation of the Hawaiian Islands . . . not inconsistent with this joint resolution, nor contrary to the constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." The procedure under which defendant was charged and convicted was in accordance with the municipal legislation of the islands and was properly authorized by the resolution, unless in this respect such legislation was contrary to the constitution of the United States. It was contrary to the constitution, if the Fifth and Sixth Amendments were applicable, otherwise it was not, and this was the single question to be determined. The decision of the United States District Court, on application for writ of

[1] 30 Stat. at L. 750.

habeas corpus, was that defendant was unlawfully held in custody, and this decision was reversed by the Supreme Court of the United States. The decision of the court was announced by Mr. Justice Brown, but Justices White and McKenna, who concurred in the conclusion reached, based their concurrence on grounds somewhat different from those stated in the opinion of Mr. Justice Brown, while the Chief Justice, speaking for a minority of four judges, dissented from the conclusion reached, and Mr. Justice Harlan, one of the minority, expressed his views at length in a separate opinion. It therefore appears that as to the reasoning on which a conclusion should have been reached, the opinion of Mr. Justice Brown represents fully the views of three of the judges; that of Mr. Justice White, the views of two; and that of the Chief Justice, the views of three. It is to be noticed as of much significance in its bearing on the views to be expressed in this article that the four Justices in the minority are the same as those dissenting in the Downes case,[1] and that the principles relied on in the dissenting views in the one case are substantially the same as those in the other. In the Downes case the question was whether an act of Congress, known as the Foraker Act, imposing duties on goods brought from the Island of Porto Rico into the ports of the United States, was in violation of the clauses of the constitution relating to commerce; and the discussion in the two cases runs on parallel lines, though, as will be noticed hereafter, there is ground for distinguishing the two cases and justifying diverse conclusions. The majority of the court in the De Lima case,[2] decided at the same time as the Downes case, which was composed of the judges who dissented in the Downes case with the addition of Mr. Justice Brown, who writes the majority opinion, held that on the ratification of the treaty with Spain Porto Rico ceased to be foreign country, and the Dingley Tariff duties could no longer be levied on goods brought into the United States from its ports; while the minority, consisting of the judges who united in the concurring opinion of Mr. Justice White in the Downes case, expressed the view that as the Dingley Tariff duties were applicable to goods imported from Porto Rico prior to the treaty with Spain, they continued applicable to such goods until Congress should change the law.

In a very brief way the important questions considered in these

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[1] Downes *v.* Bidwell (1901), 182 U. S. 244.

[2] De Lima *v.* Bidwell (1900), 182 U. S. 1.

three cases have been stated in order to show their relations. All the previous decisions of the Supreme Court of the United States, having any apparent bearing on the questions involved, are referred to and fully discussed *pro* and *con* in the opinions filed in these three cases, and the expressions of views of various jurists and public men are extensively cited. It would be a work of supererogation, therefore, to refer to the earlier authorities, nor would it be feasible within the reasonable limits of a magazine article to restate the arguments which are set forth as influencing the judgment of the various members of the court, and the answers made by other judges to these arguments. The object of this article is to classify these views as fully as practicable in order that the principles announced as distinct from the mere conclusions reached may be understood, and especially that it may be ascertained what light these announcements throw on the probable course of decision of the court in future analogous cases. This article is not written for the purpose of controverting the soundness of the position taken by any of the judges in these cases, though the writer will venture in the conclusion to suggest possible solutions of some of the difficulties which have not received the approval of any considerable number of the judges of the court. No one can read the opinions in these three cases without feeling that the questions involved are of very great difficulty, and that the views of the judges have been formulated only after exhaustive investigation and a careful consideration of their significance as affecting questions not involved.

The principles recognized by the various judges in these cases may be briefly and somewhat loosely stated as follows:

In the De Lima case the question was as to the effect of the annexation of territory to the United States by treaty, and the majority of the judges agree on the proposition that upon the ratification of a treaty of annexation the territory involved becomes territory of the United States, though, as appears in the other cases, the judges who constitute the majority in that case are divided as to the extent or effect of such annexation of territory, that is, as to whether it becomes for all purposes and in every sense a part of the territory of the United States and fully incorporated therein, or whether it still remains distinct as territory annexed but not incorporated, save as such incorporation may result from the express provisions of the treaty or subsequent action of Congress; while the minority take the un-

qualified position that the mere extension of the sovereignty of the United States over annexed territory does not in any sense incorporate it into the United States or change its relations to the United States as a municipal government, save as the power of that government is expressly extended over it.

In the Downes case the majority view is that the restrictions of the constitution on the power of Congress do not as a whole and of their own force apply to such acquired territory, the difference of opinion among the majority being as to whether some formal action, of either the treaty-making or legislative power, is necessary to make constitutional restrictions applicable to newly acquired territory, or whether, though the constitution is self-operating, as it were, the territory thus annexed remains outside of the territory to which the constitution applies until expressly incorporated. These views cannot be very accurately represented in a brief statement, but, as opposed to each other, they seem to be, on the one hand, that the constitution must be extended by treaty or legislation in order to give it effect in new territory, and, on the other hand, that while the constitution operates and takes effect regardless of treaty or legislation, it only thus operates and takes effect on territory which by treaty or legislation has been brought within the scope of its provisions. The minority view in this case is that no provisions of treaty or statute can add to the force and effect of the constitution; and that the mere extension of the sovereignty of the United States over territory brings that territory within the scope of all the provisions of the constitution regardless of any other consideration.

In the Hawaiian case the difference of view of the majority is substantially that already stated in the Downes case, and the position of the minority is the same as in that case; but the nature of the case leads to an emphasizing, by that division of the majority which entertains the view that the constitution does not extend itself by its own authority, of a possible distinction between some fundamental restrictions of the constitution which might perhaps be recognized with reference to any congressional action and other restrictions which apply only to particular classes of congressional power. The other division of the majority has no occasion to do more than reiterate their position in the Downes case and insist that the Newlands Resolution was not intended to bring the territory of Hawaii at once and by its own force within the scope of the provisions of the Federal Constitution, although the

territory had been by treaty annexed to the United States. The minority contents itself in the main with the argument that the Newlands Resolution did in fact extend the constitution over the territory of Hawaii, or, what is the same thing in effect, did bring that territory within the scope of the constitution; but Mr. Justice Harlan, while concurring in this argument, announces, to its full length and in its full breadth, the conclusion that by the mere annexation the provisions of the constitution applicable in other portions of the United States became applicable in the territory of Hawaii.

The conflicting views of the judges in these cases arrange themselves around three questions, or rather three points for consideration, these questions or points being in a way distinct, although by no means independent or unrelated, as follows: (1) acquisition of territory; (2) applicability of the constitution to different classes of territory; and (3) distinctions between different provisions of the constitution as to their applicability to classes of territory. The conflicting views may perhaps be profitably restated under these three divisions of subject matter.

(1) All the judges agree that the United States as a sovereign power may acquire sovereignty over new territory which will be complete and exclusive as to foreign nations. The majority of the court concludes that by this mere extension of sovereignty over new territory the internal relations of such territory to the other territory of the United States is changed, one division of the majority contending that such change is so radical as to fully identify the new territory with the other territory over which the United States is exercising sovereignty, while the other division of this majority contends that the extension of sovereignty over the territory, without more, puts it in the equivocal position of being no longer foreign territory on the one hand, nor, on the other hand, domestic territory. The minority, with reference to this question, contends that the new territory under such circumstances, although potentially, as it were, within the sovereign power of the United States so far as to exclude any other sovereignty, is not, to any extent, or for any purpose with reference to the constitution and laws of the United States, a part of the territory over which such constitution and laws extend of their own force.

(2) All the judges agree that Congress has power to legislate for the territory over which the sovereignty of the United States has been extended, such power existing in Congress by virtue of

the Federal Constitution, either as an implied power, or as one expressly delegated under the grant of power given to Congress in the Fourth Article "To dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." And all the judges agree further that in view of the nature of the government provided for by the constitution, unlimited power is not given to Congress with reference to such newly acquired territory. It is the view of the majority, however, that the limitations on the power of Congress in this respect are either unwritten or consist of restrictions found in that instrument as to some fundamental matters, and do not include all the limitations of the constitution, while the minority think that Congress in exercising its power with reference to newly acquired territory is subject to all the restrictions found in the Federal Constitution relating to the exercise by Congress of its powers.

(3) All the judges recognize a distinction between the powers which Congress may exercise with reference to territory within state limits, and that which it may exercise as to territory outside of state limits; but they differ as to whether all the limitations of the constitution applicable to the powers of Congress to legislate with reference to territory outside state limits belonging to the United States at the time of the adoption of the constitution are applicable to legislation with reference to territory subsequently acquired. They might have held that all the limitations on the power of Congress, found in the Federal Constitution and its amendments, were applicable only to the exercise of its power within territory included within state lines, and that as to territory outside of state lines its power is sovereign and unlimited, and some of them incline to this view; but the majority of them admit that there are some limitations upon the power of Congress in its action with reference to territory outside of state lines.[1] If there are such limitations, they must be written among, or implied from, the provisions of the constitution itself, for the whole theory of our constitutional system excludes the possibility of any court arrogating to itself the power to say that Congress has overstepped mere general and indefinite limitations in such sense that its acts are invalid; for no judicial tribunal which derives its authority from the constitution

[1] The contention in Downes *v.* Bidwell that all the cases recognizing the applicability of the limitations of the constitution outside of state limits are explainable on the theory that the constitution has been extended by treaty or act of Congress is denied by the minority and not acceded to by one division of the majority.

can exercise authority beyond that which by the constitution is expressly or impliedly given to it.[1] Therefore limitations on the power of Congress to legislate with reference to the territories must be found in the constitution, and conceding that not all the express limitations in the constitution are applicable to Congress thus legislating, the fact that some of the judges insist on a distinction between territory which was under the sovereignty of the United States but not within state limits at the time the constitution was adopted, and territory subsequently acquired, makes it necessary, for a convenient discussion of the application of particular limitations to particular classes of territory, to make a classification of territory subject to the jurisdiction of the United States; that is, assuming that the limitations on the power of Congress found in the constitution are applicable whenever and wherever Congress attempts to exercise the power on which such limitations are imposed, it is necessary to consider the territorial application of the various limitations found in the constitution. For this purpose the following classification may be made: (*a*) territory included within state limits and subject to the jurisdiction of the states respectively; (*b*) territory within state limits as to which, by consent of the states concerned, exclusive jurisdiction has been conferred on the United States in pursuance of the provisions of the paragraph[2] relating to the District of Columbia and places purchased by the United States for the erection of forts, dockyards, and needful buildings; (*c*) territory which at the time of the adoption of the constitution was not within the limits of any state, but was within the territorial limits of the sovereignty of the United States, including the Northwest Territory and other territory which, claimed by the respective states, had been already ceded or was afterwards ceded by such states to the United States; (*d*) territory subsequently acquired by the United States by treaty. Subsequently acquired territory, as described in division (*d*), might be subdivided in various ways, but any distinctions as to the applicability of constitutional provisions to different portions of such territory depend evidently on provisions of treaties or statutes with reference thereto and are immaterial for present purposes. Now it is evident that as the primary purpose in the adoption of the Federal Constitution was to provide for a common government of the states, all the constitutional limi-

[1] The writer begs to refer on this subject to his article on "Unwritten Constitutions in the United States," 15 HARV. L. REV. 531.

[2] Art. 1, Sec. 8, Par. 17.

tations are applicable to legislation so far as it relates to territory within state limits. As to territory ceded by the states to the United States for a seat of government and for forts, dockyards, and public buildings, not all the limitations are applicable; for Congress has, as to such places, an exclusive power to legislate which it does not have with reference to territory within state limits. Nevertheless, as these places have been within state limits, no doubt all the general limitations on the power of Congress were intended to apply here. No reason is discoverable in the constitution for supposing that territory within the description of division (*c*) should stand on a different footing than that in division (*d*), and if it was contemplated that the provisions of the constitution extended to territory of the one class it must also have been contemplated that they extended to territory of the other, unless we should say that acquisition of new territory was not contemplated; but if not contemplated it was not authorized, and the general agreement on the proposition that new territory may be brought within the sovereignty of the United States would seem to preclude further argument. It would have been much easier to reach a satisfactory conclusion if the judges could have agreed that the question was whether the limitations of the constitution are applicable to legislation with reference to territory not included within state lines.

If it be permitted to suggest a line of decision which would not have involved the complicated distinctions made or attempted in the cases under discussion, and to consider the results which the court following such line of decision would have reached in these cases, it is briefly submitted that without serious difficulty or disastrous consequences it might have been held that all territory over which the sovereignty of the United States is extended becomes incorporated into and a part of the territory of the United States; that the power of Congress to legislate with reference to such territory is given by the constitution and subject to the limitations of the constitution; and that these limitations are divisible into two classes, those of the one class being applicable to legislation relating to territory within state limits, the other to legislation of any character regardless of territorial limits. Under such a line of decision the De Lima case could have been decided just as it was decided; for the distinction which the majority in that case attempts to make between annexed territory and domestic territory is made solely with a view to the conclusion to be reached in the Downes

case. It is further submitted that the Downes case might have been decided just as it was decided, for the question was whether the Foraker Act imposing duties for the benefit of the territorial government of Porto Rico upon goods brought from that island into the states was in violation of any limitations on congressional power; and it might reasonably have been said that the provisions of the constitution as to uniformity [1] were applicable only with reference to commerce among the states or between the ports of any state and foreign countries. Without amplifying this suggestion, it is sufficient to refer to Professor Langdell's article in the January number, 1899, of this magazine,[2] in which the possibility of such construction is considered. As will be hereafter indicated, the present writer does not agree with Professor Langdell's conclusion that there are no limitations on the power of Congress with reference to legislation over territory outside of state lines, but his reasoning would seem to sufficiently sustain the view that as the limitations in sections eight and nine of Article One were evidently intended to prevent discriminations among the states they should be limited to that purpose. With this purpose in view, it would seem perfectly justifiable to hold that the requirement of uniformity is limited to such duties, imposts, and excises as Congress may impose for the support of the federal government regarded as a government of the states; and that the prohibition of preferences to the ports of one state over those of another should be limited in the same way. That these provisions were adopted with reference to the states of the Union is indicated by the restrictions of section ten of the same article upon the powers of states as to duties on imports and exports and duties of tonnage. Under this view there would be no objection to the imposition by Congress of duties upon goods brought from any territory of the United States outside of state limits into the ports of any of the states for the purpose of raising revenue for the support of the territorial governments, for such duties would be levied by Congress, not under the general power to levy duties, imposts, and excises, but under the power to legislate for territory of the United States outside of state limits. It is difficult to conceive any reasonable objection which could be made to the holding that the doctrine of uniformity as to imposts, duties, and excises, like the rule of apportionment

[1] Sec. 8, Par. 1 and Sec. 9, Par. 6, of Art. 1. Clearly Par. 5 of Sec. 9 would have no application.

[2] 12 HARV. L. REV. 365.

of capitation and other direct taxes, should be limited to the power of Congress to raise revenue for general purposes.

The application of the line of decision above suggested to the question in the Hawaiian case, that is, the effect of the Fifth and Sixth Amendments on proceedings in territorial courts, would perhaps be more difficult, and yet a satisfactory solution might easily be reached. The contention on the one hand would be that as the only judiciary directly contemplated by the constitution is the federal judiciary, exercising its power within territory included in state limits, these amendments have no application to territorial courts which are not created or authorized in pursuance of the judiciary article, but are provided for or authorized by Congress under the authority to legislate for the government of the territories. On the other hand, it could be contended that these amendments forming part of the Bill of Rights were incorporated into the constitution as a result of the fear that too great a measure of power was being given to the federal government,[1] and the conviction that Congress should be limited as state legislatures had already been limited in state constitutions for the protection of individual rights, and were intended to apply to the exercise of any power vested in Congress by the constitution, including the power to make rules and regulations for territory not within state limits. The latter of these views seems to the writer of this paper to be more in consonance with the principles of our constitutional government. If it is admitted that the framers of the constitution contemplated the exercise by Congress of the power of providing territorial governments, it can hardly be conceived that they intended to give to Congress unlimited power in this respect. It must be borne in mind that the protection of individual rights and property against the undue exercise of governmental power was an ever-present motive in the framing of the state and federal constitutions; and that the rights thus protected were not conceived of as the rights of any particular persons but of all persons. It is hardly imaginable that the framers of the constitution, having in mind the principles of the Declaration of Independence, would have deliberately contemplated the subjection of any class of people who should come within the jurisdiction of the United States to an arbitrary and unlimited power which they did not tolerate for themselves. An argument against this conclusion is

[1] See 6 HARV. L. REV. 405.

that predicated on the assumption that the ordinary methods of procedure in common-law courts cannot be applied in courts proceeding in accordance with the principles of another system of jurisprudence; but it is a significant fact that the courts of Louisiana, in which the civil law system still prevails, have been able to administer justice, both civil and criminal, without the violation of any of the fundamental principles of the common law. True it is that some changes in methods of procedure were necessary after Louisiana became a part of the Union, but these changes were easily made there, and might easily be made in any jurisdiction where justice is being administered in accordance with the forms of law. It is not necessary that the final and complete sovereignty of the United States be extended to any territory in which a system of civil and criminal law cannot be put in operation for the government of all persons who by the acquisition of such territory become subjects of the United States. Looking at the Newlands Resolution from this point of view, it would not be difficult to reach the conclusion that it was intended that criminal procedure in the territory of Hawaii should be administered after the treaty for the annexation of the islands went into effect in accordance with the requirements of the Fifth and Sixth Amendments. It may be that jury trial in Hawaii or in the Philippines would be to some extent unsatisfactory, but it is likewise unsatisfactory under some conditions found to exist in other portions of the territory of the United States, and mere inconvenience is not a sound argument as against the application of either a constitutional or statutory requirement. The most serious objection to regarding the constitutional requirements of indictment and jury trial to be applicable in the territories is that the states may dispense with these requirements so long as they do not take away due process of law, while Congress cannot, under the view here suggested, dispense with them in the territories. But the assumption that these restrictions bear harder upon Congress than upon the states is superficial. Such requirements have been found in the constitutions of all the states, and they have been modified only by amendment of those constitutions. The restrictions of the federal constitution, construed as limiting the power of Congress to provide for territorial governments, may likewise be removed by amendment. There is no essential dissimilarity between the two classes of cases.

The court in the cases above referred to has not indicated any definite conclusion on the interesting question as to the status of

the inhabitants of the territory recently acquired by the United States, but, from the views expressed by the various judges, it may well be surmised that when the question arises there will be radical differences of opinion. It may, indeed, be contended that there may be within such territory subjects of the United States, individuals whose personal and property rights are permanently controlled by laws made by or under the authority of Congress, who are not and cannot become citizens; and that persons born within territory which has been accepted as within the jurisdiction of the United States under the broad definition of the Fourteenth Amendment are not citizens by birth. That amendment recognizes the possibility of permanent existence within the territory of the United States of Indian tribes the members of which are not citizens of the United States nor subject to its laws; and without doubt there are tribes of people in the Philippine Islands which may be put in the same category with similar effect. But it will not be easy to form a rational conception of the situation of persons who owe allegiance to the laws of the United States, and of territorial governments established under the authority of the United States, who are not, by virtue of that fact, citizens of the United States. Such a conception would, it is submitted, be inconsistent with the rules of international law so far as they affect the rights and privileges of those persons going for a proper and temporary purpose from the limits of the United States into foreign countries, and, it is also submitted, it would be contrary to the principles of our constitutional system of government; and yet, if Professor Langdell's exposition is sound to its fullest extent, such a conception, with all the complications following it, must be entertained. Indeed the fundamental objection to the theory is that it must lead to the conclusion that persons born in any part of the territory of the United States, outside of state limits, are not *ipso facto* citizens of the United States under the provisions of the Fourteenth Amendment. Such has not been the practical construction placed upon that amendment. It will certainly be difficult to establish a theory of the constitution under which children born of white parents permanently residing in Porto Rico or the Hawaiian or Philippine Islands are not American citizens, and it will be equally difficult to point out any recognized distinction between children born of white parents and those whose parents are Negroes, Malays, or Indians, provided at the time of the child's birth such parents are subject to the laws of the United States with the intention of con-

tinuing subject to those laws. No such distinctions as to color have been recognized with reference to citizenship by birth, though they have been perpetuated as to citizenship by naturalization. Bearing in mind the important fact that rights of citizenship do not include political rights, which are not regarded as inherent but as conferred in accordance with the dictates of public policy, there seems to be no particular reason for denying the rights of citizenship to any class of persons who are subject to the laws. The line of decision which has been suggested would settle the question of citizenship without any necessity for instituting fine distinctions.

Emlin McClain.

DES MOINES, IOWA.

RECENT PROGRESS TOWARDS AGREEMENT ON RULES TO PREVENT A CONFLICT OF LAWS.

PUBLIC International Law overshadows what we are accustomed, rightly or wrongly, to term Private International Law. It overshadows it both in dignity of character and in fixedness of character. No one now doubts that there is a public international law of binding force, so far as any law can be declared obligatory for which no sovereign has supplied or can supply a sanction. That it exists and is a part of the common law of England has been the doctrine of Anglo-American courts since the middle of the last century. That it exists and has a binding force is assumed in the Constitution of the United States, in its provision that Congress may define and punish offenses against the Law of Nations. It defines, but does not create them.[1]

Private international law stands on very different ground. It is only an expression of the opinion of particular courts or jurists as to what law should be applied to the determination of a question involving private rights of foreigners or private rights claimed by virtue of some foreign transaction. It is a doctrine of preferences between different laws of different sovereigns. The old name of Conflict of Laws is still the more scientific one, and Germany and Italy not unreasonably adhere to it. Private international law is something to which the world is working up. It is, in strictness, a term of the future.

A Dutch jurist, Dr. Jitta of Amsterdam, in 1890 published a volume entitled "Méthode du Droit International Privé," in which he asserts that the growth of civilization has brought us to a point where we can recognize rights of man as a citizen of the world which are superior to any rights that a particular State can give to its particular citizens. But there are few subjects as to which humanitarian and sentimental considerations can fairly be expected to lead to international legislation. There is a field for the Red Cross. There was a legitimate standing ground for the Hague

[1] United States *v.* Arjona, 120 U. S. 479, 488.

Convention of 1899 as to the conduct of war. When, however, we come to such subjects as the weight to be given to foreign judgments, or the rights of a foreign guardian, we get little aid from the impulses of humane feeling or the modern sense of the brotherhood of man. It is not by *a priori* comprehensive schemes of world-law that provision is to be made for the ordinary cases of a conflict of laws. It must come, like every other thing of permanence and value, by a slow course of progress from small beginnings.

In 1889 a South American Congress of Private International Law sat at Montevideo to concert some general continental scheme of regulation. Seven nations were represented. Eight conventions were framed, comprehending almost a code upon the subject, which have since been made the basis of treaties between several of these powers.[1] All European nations were invited to become parties to these conventions, and there is reason to think that Spain gave the matter some consideration before the war which drove her out of Cuba and so largely destroyed her interest in American affairs. In 1900 she brought it before an informal gathering of the States of Latin America, which she summoned at Madrid. Fifteen of them were represented, and the results reached at Montevideo were favorably considered.

The second Pan-American Congress, which met at Mexico in 1901–2, set out to accomplish a still more ambitious task. This was the preparation of a code both of Public and of Private International Law, to be drawn up as soon as may be by a commission of five American and two European jurists.

Meanwhile Europe had gone to work in a more modest and quiet way. There was no attempt to call a Pan-European Congress. There was no desire that all Europe should participate in it.

In 1893 the Netherlands issued invitations to such European States as she judged best, to send delegates to a Conference at the Hague to consider the adoption of identical laws or of an international convention on certain subjects relating to personal *status*, private property, and the forms of legal documents. Thirteen nations sent delegates, and similar Conferences were held in 1894 and 1900, resulting in conventions for determining what law shall be applicable in case of conflicting claims as to matters of marriage, divorce, and guardianship, and to successions and bankruptcies, and to regulate certain methods of judicial procedure

[1] 29 London Law Magazine and Review, 2.

affecting foreigners. The conventions as to the celebration of marriage, adjudication of divorce and guardianship, were, by the summer of 1902, ratified by the executive departments of twelve of the powers. To that concerning successions ten acceded, but as Russia and Hungary refused their assent, the Netherlands has called another Conference to revise that and, as to some points, the others, which will assemble in May, 1904.

Ratification by the legislative departments is required in the case of a number of the powers concerned, and it may be presumed that this will be generally deferred until the Conference of 1904 has done its work.

The Netherlands has been criticised for not extending wider invitations to these Conferences. At the last meeting of the International Law Association, at Antwerp, in September, 1903, this feeling found some expression, and Dr. Meili, one of the Swiss delegates, in a work recently published, gives voice to the same opinion, in regard to the absence of England and the United States.[1] There would seem, however, ample justification for omitting to invite them. The Netherlands wisely thought it best to move slowly, and in concert with those powers that might be expected to take the same view of many, if not most, of the questions to be presented. Only nations of eastern and central continental Europe therefore were asked to participate. There were points of difference enough between them, but they were neighbors, and most of them had a jurisprudence founded on the Roman law. The presence of representatives from insular England, and countries across the Atlantic, having a common law differing widely from the Roman, and a judicial system differing not less from that found generally on the continent, would have doubled the occasions of difference. It was natural to desire to get a continental agreement first, at least, before going beyond seas for new adherents.[2]

Take, for instance, the vexed question whether domicil or nationality should be the test of personal capacity. No advocate of nationality as the criterion would have welcomed the presence of Englishmen or Americans. Even the Latin-Americans at the Montevideo Congress had decided in favor of domicil. In the Hague conventions, however, that of nationality was agreed on.

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[1] Das internationale Civilprozessrecht auf Grund der Theorie, Gesetzgebung und Praxis, Zurich, 1904, p. 26.

[2] See M. Asser's remarks on this subject on taking the Chair in the Conference of 1894. Actes de la Deuxième Conférence de la Haye, etc. The Hague, 1894, p. 13.

If the Hague conventions, as they may be revised and perfected this year, should go into full force in eastern and central Europe, it is probable that on certain points the United States would eventually be glad to express their concurrence in them, by some formal act of adherence, on the part of the treaty making power. There may be constitutional objections to such action in respect to some of the matters involved, owing to the peculiar relations of the States to the United States. But so far as the United States can speak, it would be obviously desirable that they should. The difficulties for instance now in the way of the marriage of Americans abroad are so great as to be almost prohibitory; and it is largely for want of a prescribed rule, applicable to those of every State. Congress has gone as far as it dared to venture by Revised Statutes § 4082, which allows marriages before consular officers of those who would be authorized to marry if residing in the District of Columbia. The State Department, however, frowns upon such marriages, and with good reason.[1] If the United States were now to recommend to the several States the enactment of identical laws in respect to foreign marriages of their citizens, conforming in whole or part to the conclusions of the Hague Conferences, it could hardly fail to be of advantage. Such a piece of advice might have been treated, fifty years ago, as a gratuitous interference with reserved rights, but it would shock few at the present day. The Civil War and the Fourteenth Amendment have brought the States and the United States into such intimate relations, and the objects to be attained are both so important and so far removed from party controversy, that any recommendation of this nature by Congress would at least receive the most respectful consideration.

The inconvenience resulting from a conflict of laws between our States on the subject of commercial paper has of late been largely avoided by the general adoption of the Negotiable Instruments' Act, framed by the Annual Conference of the States for Promoting Uniform Legislation. It is from the action of this body that the most is to be hoped for in the immediate future in smoothing the way to general agreement within the United States as to matters of private law. Identical statutes in different States avoid many questions incident to a choice between different statutes of different States. The existence of this American conference, as a permanent body, was one of the causes that encouraged the Netherlands to

[1] 3 Wharton's Int. Law Dig. § 261.

call the first Hague Conference.[1] Its work ought to be forwarded by all who are interested in advancing the unity of American jurisprudence.

It is understood that those in charge of the preparations for the Universal Congress of Jurists and Lawyers, to be held at St. Louis on September 28, 1904, are considering the advisability of bringing before that body for discussion some of the results of the Hague Conference of 1900. Such a step would serve at least one good purpose: it would give the American bench and bar a better knowledge of what Europe is now doing in the field of law reform. It might also lead to American legislation on the part of some of our States on the lines marked out at the Hague.

A somewhat similar Congress, that of Private International Law, which was an incident of the Paris Exposition of 1900, initiated a movement that may prove of wide importance. This was the creation of a standing commission to endeavor to organize an international Institute, a leading object of which should be the collection and publication of statutes and judicial decisions of the different nations of the world.

The Brussels conferences of 1883 and 1886 initiated a movement in the same line, resulting in a convention between eight powers, which all of them ratified in 1889. As between the United States, Belgium, Brazil, Italy, Portugal, Servia, Spain, and Switzerland, this secured the prompt transmission by each government of copies of all its official publications, thereafter issued, to the bureau of international exchange in every other. A supplementary Convention between the same powers, excepting only Switzerland, also went into effect at the same time, under which copies of the parliamentary proceedings thereafter published by each are sent, also, direct to the legislative departments[2] (*aux chambres législatives*) in the rest. The absence of most of the great powers from the list of the adherents to these conventions shows that they offer an imperfect measure of relief against a real evil, the ignorance of nine-tenths of the world as to the changes in the law which time is daily working.

This measure contemplates also the exchange of but a small part of what each country could furnish. It makes no provision for the publications made before 1889. So far as this country is

[1] Actes de la Conférence de la Haye, chargée de règlémenter diverses matières de Droit International Privé. The Hague, 1893. pp. 625.

[2] 25 U. S. Statutes at Large, 1465–1471.

concerned, it makes none for those of the States. Nor does it look to the use of the material gathered for general information, in the shape of new publications.

The commission proposed by the Paris Congress of 1900 has a wider scope of duty and of possibility. Such a body could achieve a good deal, if it could form a connection with some public or quasi-public foundation, of a national character, like for instance in this country the Smithsonian Institution or the Carnegie Institute. It could decide what was worth publication and what was not, from a scientific point of view, unhampered by the requirements of official etiquette, and unembarrassed by a need of seeking the favor of administrative bureaus or legislative committees. If any great public library should be built up at some central point, under the patronage of a commission of this nature, it would mean a good deal; but of far more importance would be the use of this library as a source of selection by impartial judges for what of the modern law of every country is worth the knowledge of all countries.

Simeon E. Baldwin.

YALE LAW SCHOOL, Feb. 26, 1904.

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RES JUDICATA. — The distrust of the layman for the technicalities of the law will be increased and a new significance will be given to the ancient opinion that "estoppels are odious" by a recent decision of the United States Supreme Court. In 1896 a Kentucky circuit court decided that the Hewitt law constituted an irrevocable contract exempting the defendant bank from certain taxes. In 1898, in a suit between the same parties, a federal court enjoined the attempt to collect the tax for future years, holding the judgment of 1896 conclusive evidence that an irrevocable contract existed. Subsequently the Kentucky Court of Appeals, in reversing the judgment of 1896, decided that no irrevocable contract existed, and the case was remanded. In the new trial the bank introduced the decree of 1898 as rendering the irrevocability of the contract *res judicata.* Upon error to the Supreme Court of the United States this defense was sustained by a majority of one. *Deposit Bank* v. *Board of Councilmen,* 24 Sup. Ct. Rep. 154. A well-reasoned decision of a federal circuit court,[1] directly *contra,* which apparently escaped the notice of the court, must now be regarded as overruled. In consequence of this decision, the plaintiff in the new trial is thrown out of court by an indirect effect of the very judgment which it has just succeeded in reversing.

The effect of an estoppel whether by judgment, by deed, or *in pais,* is merely to preclude the party estopped from disputing the existence of certain facts or the correctness of certain propositions of law.[2] Any contention that the estoppel *per se* actually establishes the objective existence of the facts is obviously erroneous, for it is freely conceded that the parties

[1] French *v.* Edwards, 4 Sawy. 125.

[2] Co. Litt. 352a.

estopped by a judgment might have avoided the estoppel by introducing other evidence,[3] and estoppels by deed and *in pais* are admittedly most valuable when they prevent a party from setting up actual facts.

This being the nature of estoppel, there are two possible views of the effect of a judgment based on an estoppel. The first is that it merely affirms the existence of the estoppel and enforces it as a bar against any attempt to set up the facts. But if the decree of 1898 merely affirmed that the existence of the judgment of 1896 existed as an estoppel and precluded the plaintiff from asserting that the contract was revocable, it would be clearly competent in the new trial for the plaintiff, while conceding the correctness of the decree which decided that an estoppel then existed, to show that since 1898 the estoppel had been removed by the reversal of the judgment.[4] The principal case can then be sustained only on a second theory, namely, that in dealing with a former judgment a court regards it not merely as preventing the questioning of certain facts, but as conclusive evidence of their actual existence; that the federal decree of 1898 not only asserted the existence and conclusiveness of the judgment of 1896 as an estoppel, but asserted further the correctness of that judgment as a judgment on the merits, so that the decree of 1898 was an independent adjudication that the Hewitt law actually constituted an irrevocable contract. This view is fictitious, for to affirm that a judgment based on an estoppel establishes the facts, but only between the parties, is in effect to admit that it does not establish the facts at all. Furthermore, as is frequently the case when fictions are consistently adhered to, it leads to consequences undesirable from a practical standpoint, as is illustrated by the decision of the principal case.

Liability of National Banks Acquiring Shares in a Partnership. — National banks, although given great freedom as to the kinds of security that they may take for already existing loans, may nevertheless be subjected to some restrictions. A national bank in a recent case accepted as security nine of the forty transferable shares of a partnership. In the course of realizing on this security the bank accepted a transfer of the shares and participated in the management of the partnership. Debts were contracted and the partnership became insolvent. It was attempted to hold the bank liable for such debts as a partner, thus subjecting it to the burden of the insolvency of other partners. The court held, however, that the bank, though able to own the shares, had no capacity to become a partner. The bank, however, was held to have become a part owner of the partnership property, such ownership being in its nature several, and was held liable for its proportional share of the debts in question but no more. *Merchants' National Bank* v. *Wehrmann*, 68 N. E. Rep. 1004 (Oh.).

If the court is right in saying that the bank had capacity to hold and did hold title to the shares, it would follow that the bank became in all respects a partner, for from the nature of the shares that is a necessary consequence of their ownership. Although a corporation is generally held to lack capacity to form a partnership,[1] it may become a partner if the char-

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[3] *Cf.* Chicago Theological Seminary *v.* People, 189 Ill. 439.

[4] *Cf. In re* Anglo-French, etc., Society, 14 Ch. D. 533.

[1] Aurora State Bank *v.* Oliver, 62 Mo. App. 390; Whittenton Mills *v.* Upton, 10 Gray (Mass.) 582.

ter so authorizes.[2] The question therefore is what powers were conferred on the bank in this case. The national banking act allows national banks to do business incidental to banking.[3] This might be construed to allow a bank to become a partner when according to the ordinary methods of that business such a course is necessary to realize on securities. Similarly a bank taking shares in another bank to collect a debt, becomes liable as a shareholder.[4] But to allow a bank to become a partner is going considerably farther because the bank is thus subjected to unlimited liability for partnership debts. The capacity to enter a partnership is so rarely conferred upon a corporation and is so dangerous to the safety of banks that the presumption against such capacity is very strong. The general words of this statute are hardly sufficient to grant so unusual a power.

If the bank could not become a partner it would follow that it had no capacity to own the shares. If therefore the capacity were lacking, the attempted transfer was not effective to pass title. Similarly an *ultra vires* purchase of stock in another bank has been held to give the purchasing bank no title.[5] The better view is, therefore, that the bank, having no title, incurred no liability for any partnership debts.

The view of the principal case is an illogical compromise between the two views suggested and is unsupported by authority. The idea of a several ownership of an undivided nine-fortieths interest is a conception difficult to grasp and apparently an innovation in the law.

Cancellation of Instruments on which Action at Law is Pending. — Although it is now almost universally held that fraud may be pleaded in bar of actions at law on written instruments, yet equity commonly gives the relief of compulsory surrender and cancellation.[1] Where there is an action at law already pending, however, the courts of equity are not agreed as to whether it is advisable to interfere. In those jurisdictions where by statute a defendant at law may compel his opponent to prosecute his action to a judgment, the rule of the United States Supreme Court[2] would seem to be adequate. Here the bill is simply dismissed, the suit at law being regarded as means sufficient to bring about justice between the parties. A recent decision of the United States Supreme Court rests on this view of the case. *Cable* v. *United States Life Insurance Co.*, 24 Sup. Ct. Rep. 74.

In jurisdictions where the defendant at law is not protected by the statute mentioned above, the question is more difficult. If the plaintiff at law fails to prosecute his action to a judgment, the plaintiff in equity is in no better position than he would have been if no action at law had been brought. Influenced by this view of the case, a number of jurisdictions allow the bill, enjoin the action at law, and decree the relief if it is warranted on the hearing.[3] It is obvious, however, that such a proceeding

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[2] Butler *v.* American Toy Co., 46 Conn. 136.
[3] U. S. Comp. Sts. 1901, § 5136.
[4] National Bank *v.* Case, 99 U. S. 628.
[5] California Bank *v.* Kennedy, 167 U. S. 362.

[1] Fuller *v.* Percival, 126 Mass. 381. *Contra*, Allerton *v.* Belden, 49 N. Y. 373.
[2] Grand Chute *v.* Winegar, 15 Wall. (U. S.) 373.
[3] Metler's Administrators *v.* Metler, 18 N. J. Eq. 270.

may involve an injustice to the plaintiff at law. He has been unnecessarily hampered in the enforcement of a legal right, if it appears that the plaintiff in equity is not entitled to the relief sought. A better disposition of the case, although not sustained by any considerable authority, has been suggested both in England and America.[4] This is merely to retain the bill without relief pending the speedy prosecution by the plaintiff at law of his action there. In the event of his failure so to do, the court of equity is in a position to proceed immediately to give relief. The court thus retains control of the situation without piling up the costs and without interfering with a speedy determination at law of the rights of the parties.

Extent of the Public Easement in City Streets. — It is commonly stated that the easement of the public in land used for streets consists of the right to use the land for all reasonable public purposes to which a street is naturally fitted. Conversely the owner of the fee is held to retain all rights in the property not inconsistent with the full enjoyment of the easement by the public. It follows that if the latter uses the land for purposes not included within the scope of the original easement it is an infringement of the owner's rights, legally entitling him to compensation. As the standard governing the extent of the public easement is however continually broadening in its application under modern conditions, the landowner's actual rights are becoming more and more restricted, and tend to become identified with those of any other member of the general public.

The difficulty is to determine what is a reasonable use of the street for public purposes. How far can the public go in using a highway without imposing an additional servitude upon the land? In answering this question the courts have naturally distinguished between city streets and country roads on the ground that a city street has always been and may properly be subjected to greater burdens than a road in the country, since it affords a natural and appropriate channel through which necessities and conveniences peculiar to city life may be made accessible to the public.[1]

As to most uses to which city streets can legitimately be put the law is well settled. Thus the public may build sewers,[2] lay water-mains, and gas-pipes,[3] etc., in the highway without being required to compensate the owner of the fee. So horse and trolley cars may be operated and trolley poles and wires erected.[4] Telegraph and telephone poles, on the other hand, are generally held to impose an additional servitude;[5] and such is practically the universal rule in the case of steam railroads of the ordinary type. As to elevated railways the law is not yet settled, but probably the better view is that they entitle the landholder to compensation.[6] An important addition to the law on this general subject has been made by a late Massachusetts case which reaches the conclusion that a tunnel or subway for electric

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[4] Hoare *v.* Bremridge, L. R. 8 Ch. App. 22. See also Glastenbury *v.* McDonald, 44 Vt. 450.

[1] Chesapeake, etc., Co. *v.* Mackenzie, 74 Md. 36, 47.
[2] Cone *v.* City of Hartford, 28 Conn. 363.
[3] McDevitt *v.* People's, etc., Gas. Co., 160 Pa. St. 367.
[4] Taggart *v.* Newport Street Ry. Co., 16 R. I. 668.
[5] See 4 Harv. L. Rev. 240.
[6] Story *v.* New York, etc., R. R. Co., 90 N. Y. 122.

cars is not an additional servitude, and gives the owner no such right. *Sears* v. *Crocker*, 69 N. E. Rep. 327. To reconcile such decisions under any single principle which will at the same time furnish a workable rule in deciding new questions, seems well-nigh hopeless. The one first noticed, that of reasonable use, for example, though often laid down, is so vague as to be nearly worthless when applied to meet new conditions. In place of any single principle it is submitted that the authorities fairly result in the following distinct propositions, which define the proper limits of the public's right. (1) The public may make repairs and incidental changes in the land necessary for the fullest enjoyment of its easement. (2) Uses of a highway that are long established and usual, together with new ones analogous to them, such as use for sewers, gas-pipes, etc., impose no additional burden on the land, since they must fairly have been within the owner's contemplation when the easement was acquired. (3) Since a highway is primarily for travel, a strong presumption arises that any use of the land for this purpose is within the scope of the easement, even although its form may be entirely new. This presumption, however, is rebutted by proof that the new mode of travel is necessarily very burdensome or prejudicial to the landowner. The Massachusetts case last referred to is clearly within the application of the third principle thus advanced; and in the absence of any showing that the tunnel would be unreasonably burdensome to the abutter, it is believed to be sound.

Apportionment of a Lake-Bed. — The extensive cutting of forests in recent years has led to the disappearance of a great many fresh-water lakes. Every such occurrence may bring before the courts a most perplexing problem, namely, the apportionment of the lake-bed among the riparian owners. A recent Minnesota case furnishes an example. A non-navigable pond several hundred acres in area gradually dried up, leaving a tract of fertile land. The riparian owners, who, by the law of Minnesota, own the beds of non-navigable ponds, applied to have their boundary lines determined. The Supreme Court on appeal suggested that the riparian owners each take triangular pieces meeting at the centre of the pond. *Scheifert* v. *Briegel*, 96 N. W. Rep. 44.

The problem presented by the case would be greatly simplified if it were possible to say at the outset that there are in lake-beds definitely fixed boundary lines separating the property of the different owners. The law, however, is clearly against such a supposition. Boundaries under streams or lakes are not fixed, but vary with the changes in water-line.[1] If a lake, very deep at one end and shallow at the other, dries up, the owners on the shallow side will have their boundary lines lengthened as the waters recede at the expense of the owners on the deep side. For a correct adjustment of rights, then, it is apparent that a complete history of the pond in the course of its disappearance is necessary. But where an entire pond has wholly dried up in the course of a few years, and it is impossible to get such a history, it would be the practical thing to consider the pond as having disappeared instantaneously. Upon such an assumption the land would have the boundaries which existed at the time the tracts of land around the pond were laid out. It ought to be possible

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[1] Welles *v.* Bailey, 55 Conn. 292.

to determine these lines in any body of water, however irregular in shape, with some approximation to accuracy. Since the plan of apportionment suggested by the Minnesota court is wholly inapplicable to any body of water with deep indentations of shore-line, it cannot be accepted as the true solution of the problem.

The natural plan, and one which it is believed will suit all cases of this class, is, with some modification, that adopted in the case of streams. Boundary lines should run to the "thread" of the body of water, not to the centre. The "thread" of a lake consists of lines drawn from the central point of the various arms in such a way that points in those lines are equidistant from the nearest points in the shore-line on either side. These lines can be drawn with mathematical accuracy, but a rough method of determining them is to draw successive parallel shore-lines until the whole area is covered. The lines making up the "thread" will then be clearly apparent. The boundary of the various landowners' lines may then be drawn perpendicular to the shore-line, extending to the nearest point in the "thread."

It must be acknowledged that the plan suggested is inconsistent with the rule often laid down that each riparian proprietor should retain a proportionate part of the shore-line as the waters recede,[2] but that rule does not seem to have a fair basis in principle. It is surely no more than just that an owner of land bordering on a remote arm of a body of water should lose his riparian rights when the receding waters have left that arm dry land.

Forfeiture in Contracts for the Sale of Standing Trees. — The common form of contract for the sale of standing trees is absolute in terms, and contains a clause which limits the time in which the vendee may remove the trees; and if there be no such clause, the courts usually interpret the contract to contemplate the limitation of a reasonable time.[1] An interesting question arises as to the effect of this limitation when the time limited has expired. The weight of authority inclines strongly toward the view that in that event the vendee's rights in the timber are absolutely determined.[2] This is the attitude of the North Carolina courts, as is evidenced by a recent decision in that state. *Bunch* v. *Elizabeth City Lumber Co.*, 46 S. E. Rep. 24.

Such a result is easily reached if the Massachusetts view is taken that the contract conveys no title until the trees are severed from the realty.[3] If that is a sound interpretation, it is clear that, as to the standing trees at any rate, the vendee at the expiration of the period given him has neither present title nor opportunity to get it in the future.

But this interpretation, though convenient for the purpose of avoiding the fourth section of the Statute of Frauds, seems untrue, for it can hardly be doubted that the parties themselves look upon the transaction as one involving an immediate change in the ownership of the standing trees. The

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[2] Deerfield *v.* Arms, 17 Pick. (Mass.) 41.

[1] McRea *v.* Stillwell, 111 Ga. 65.

[2] Macomber *v.* Detroit, etc., R. R. Co., 108 Mich. 491; Saltonstall *v.* Little, 90 Pa. St. 422.

[3] Drake *v.* Wells, 11 Allen (Mass.) 141; Fletcher *v.* Livingston, 153 Mass. 388.

courts of other states admit there is such a change in ownership, but interpret the contract to be in effect one for the sale of a "term" in the trees, so that at the end of the time the title to whatever trees are left reverts to the owner of the land.[4] But if the parties had this idea in mind, they would surely have expressed it in much clearer terms. Both constructions considered are open to further objection on the ground that they favor a forfeiture. If, therefore, there remains any other reasonable interpretation of the contract, it should be preferred to either of these two.

Such an interpretation, it is submitted, is that offered by those courts which hold that the limitation in question applies only to the license of the vendee to enter upon the vendor's land, and to use it as a storing place for his trees before removal.[5] The objection to this view has always been that it leaves the parties at the end of the time limited in an anomalous situation.[6] The purchaser owns the trees, but has no legal right to go upon the seller's land to get them. But such a situation is not impossible of solution. One way out of the difficulty is for the vendee to enter and remove his trees. By doing so he becomes liable in trespass *quare clausum fregit*, and must pay for all damage caused to the vendor's land, not however for the value of the trees.[7] If the vendor should resist any entry upon his land, it is believed a court of equity would step in to prevent the vendee's losing the enjoyment of his property, with a decree that the vendee be allowed a further reasonable time in which to remove. In the equitable proceeding leading to such a decree the vendor would of course recover damages for all loss suffered by him, and any part of the purchase money which was due and unpaid.

Political Status of Porto Ricans. — The early treaties by which land was ceded to the United States contained express stipulations that inhabitants not electing to retain their former allegiance were constituted American citizens. The treaty of Paris contained no such provision, and on this fact is based the *dictum* of one of the Insular Cases that until their status is changed by legislation the Porto Ricans continue to be foreigners.[1] In the first case in which the question has been squarely raised, the United States Supreme Court, while refusing to decide whether or no the Porto Ricans are citizens, decided that they are not aliens. *Gonzales* v. *Williams*, 24 Sup. Ct. Rep. 177.

Since the political status of Porto Ricans has been altered neither by treaty provision nor by subsequent legislation, it is evident that the question whether they have ceased to be aliens is answered by determining whether these changes in status were involved in the transfer of sovereignty from Spain to the United States.

Allegiance distinguishes the status of the subject from that of the alien.[2] Certain incidents of the subject's situation do not belong to the latter: (1) The subject owes allegiance to his government even after he has acquired

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[4] Morgan *v.* Perkins, 94 Ga. 353; Macomber *v.* Detroit, etc., R. R. Co., *supra*.

[5] Halstead *v.* Jessup, 150 Ind. 85; Hoit *v.* Stratton Mills, 54 N. H. 109; Irons *v.* Webb, 41 N. J. Law 203. *Cf.* Davis *v.* Emery, 61 Me. 140.

[6] Mitchell, J., in King *v.* Merriman, 38 Minn. 47, 52.

[7] Irons *v.* Webb, *supra*.

[1] Goetze *v.* United States, 103 Fed. Rep. 72, 77.

[2] See Calvin's Case, 7 Rep. 1.

a foreign domicile.[3] (2) Resulting from this allegiance the state owes him a duty of protection even while abroad. (3) To a certain extent the state is responsible to foreign nations for his acts.[4] The allegiance of the Porto Ricans was thus clearly one of the most important incidents of Spain's sovereignty in the island. Spain might conceivably have retained it by an express reservation, but in the absence of express reservation, this incident of sovereignty passes in the general transfer. The case becomes all the clearer if, as is true of a grant between private persons, a treaty is to be construed with reference to the nature of its subject matter. It is inconceivable that Spain would wish to retain the obligations, or that the United States would permit her to retain the rights resulting from allegiance, and it is somewhat doubtful whether other nations would have recognized such an anomalous situation even if it had been created.

It seems clear then that the Porto Ricans are subjects. Whether they are citizens is a further question. The constitution confers certain rights only on citizens;[5] for example, the right not to be deprived of the ballot on account of race, color, or previous condition of servitude, and if the word "people" as used in the constitution is a term including citizens only, as appears probable from its use in the preamble and in the tenth amendment, the rights of assembly, petition, to bear arms, and immunity from search except by properly issued warrant, are also rights which belong only to citizens. It is possible for a state to have complete sovereignty over peoples who have no such privileges, and it would follow that no such privileges were conferred by the bare transfer of sovereignty from Spain to the United States. Whether the right of citizenship was conferred by the operation of the constitution within the island, is a question not yet finally settled. Judging from the trend of the law as indicated by the Insular Cases,[6] it will probably be decided in the negative, and the holding of the New York Supreme Court that a resident Porto Rican is not a citizen, and consequently not entitled to vote, ultimately adopted.[7]

Right to Follow Trust Money Converted by a Bank. — When a bank mingles with its general assets money which it holds as trustee, and then becomes insolvent, the *cestui's* right to follow the trust *res* is important. The older authorities generally held that this right existed only so long as the specific thing, or some definite thing into which it had been converted, could be traced. When the trust *res* was money, and was indistinguishably mixed with other money, it was commonly said that the right to follow it was gone. In Knatchbull *v.* Hallett,[1] however, where a trustee had deposited trust money with money of his own in a bank, the English Court of Appeals held, first, that tracing the money into a definite fund was sufficient identification to allow the *cestui* to follow it, and, second, that in such a case, when the trustee had drawn repeatedly on the deposit, the presumption was that he had drawn out his own money, so that the residue included the trust *res*.

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[3] East, P. C. c. 2, § 1.
[4] See Charge to Grand Jury, 5 McLean (U. S. C. C.) 306, 312.
[5] Slaughter House Cases, 16 Wall. (U. S.) 36, 78.
[6] *Cf.* Hawaii *v.* Mankichi, 23 Sup. Ct. Rep. 787.
[7] People *v.* Board of Assessors, 67 N. Y. Supp. 236.

[1] 13 Ch. D. 696.

Although most American courts have followed this so-called "modern doctrine of equity,"[2] when they have come to apply it to cases where the trustee is a bank which has mingled the trust money with its own assets and then become insolvent, the results have been diverse. They seem to fall into three groups. (1) Some allow the *cestui* to follow his money only when he can show that the cash assets actually received by the assignee included the amount of his trust money.[3] (2) Others enforce the trust whenever it can be shown that its proceeds went into the cash assets of the insolvent estate, irrespective of subsequent transactions, or the amount which actually went to the assignee.[4] (3) Still others impose a trust upon the general assets, not merely the cash, upon proof that the trust property went to enrich the estate.[5]

This last rule obviously is not supported by either principle of Knatchbull *v.* Hallet. The proceeds have never even gone into a definite fund. It is often unjust, too, for when the trust money is used in paying debts, those debts are paid in full, with the result that some creditors are preferred at the expense of others. The second rule, on the other hand, seems to be supported by both the English principles. The trust money has been traced into a definite fund, and subsequent dealing with that fund ought not to affect the trust property, according to the presumption there set forth, that a trustee will deal first with his own property. But although in that case such a presumption was justified, in the case of a bank, where both funds are grouped together as assets, and the bank expects to use them indiscriminately in the course of business, any such presumption of intention is contrary to the facts.[6] The second principle expounded in Knatchbull *v.* Hallett cannot apply to any of these cases, so those American courts which follow the first rule above laid down seem to be justified. In the case of a bank the *cestui* should be allowed to recover only when he can trace the proceeds of the trust into the funds actually received by the assignee. This is the result recently reached in a Georgia decision, where the funds coming to the assignee were less than the amount of the trust. *G. Ober & Sons Co.* v. *Cochran*, 45 S. E. Rep. 382. As soon as the course of business has so changed the character or amount of the assets that they can no longer fairly be said to contain the trust funds, the *cestui's* rights to follow the *res* should be lost.

Election of Remedy against Agent or Undisclosed Principal. — It is well established that one who deals with the agent of an undisclosed principal has, upon the discovery of the relation, two remedies at his disposal.[1] First, upon the ground that the contract is in reality that of the principal and not intended to bind the agent, he may recover from the principal. Second, by insisting that the contract was made by the agent as an independent party, he may hold the agent. In most jurisdictions, he may not only begin his action against either,[2] but he is not thereby precluded

[2] Boone, etc., Bk. *v.* Latimer, 67 Fed. Rep. 27. *Contra*, Portland, etc., Co. *v.* Locke, 73 Me. 370.
[3] Spokane County *v.* First National Bk., 68 Fed. Rep. 979.
[4] Peak *v.* Ellicott, 30 Kan. 156; Continental Bank *v.* Weems, 69 Tex. 489.
[5] Davenport Plow Co. *v.* Lamp, 80 Ia. 722; Harrison *v.* Smith, 83 Mo. 210
[6] Phila., etc., Bk. *v.* Dowd, 38 Fed. Rep. 172.

[1] Pope *v.* Meadow Springs Distilling Co., 20 Fed. Rep. 35.
[2] Cobb *v.* Knapp, 71 N. Y. 348.

from suing the other unless he prosecutes it to final judgment against one.[3]

The courts appeal in these cases to the doctrine of election of remedies, which requires that wherever, for the same cause of action, a plaintiff is given two methods of redress based upon inconsistent theories, he be compelled to elect one and waive the other.[4] In designating judgment as the point at which election takes place they have, however, made a faulty application of the principle. Whether a person has made an election is a question of fact. By reason and by authority in other lines of cases, such an unequivocal act as commencing suit would seem to be conclusive proof of a binding election.[5] Moreover, if a plaintiff's act in prosecuting a suit to within a step of judgment is not an election, it is difficult to see how the act of the court in pronouncing judgment can be more decisive. It is submitted, therefore, that these cases may be reconciled on the ground that the courts while professedly applying the doctrine of election have gone upon a theory of merger, namely, that the plaintiff has but one right of action which he may pursue against either principal or agent until it is drowned in a judgment.[6]

The doctrine of election of remedies, however, seems to have been correctly applied in a case recently decided by the United States Circuit Court of Appeals for the District of Indiana. *Barrel* v. *Newby*, 36 Chic. Legal News 172. The defendant, when sued as after discovered principal, pleaded that the plaintiffs, with full knowledge of the facts, had begun and were continuing a suit at law against the agent. The court, holding that by the suit against the agent the plaintiff had made his election, overruled a demurrer to the plea. The case is extremely interesting since it is probably the first which has reached this result. Yet it is a logical consequence, if the doctrine of election is to apply.

Whether the plaintiff should on principle be put to his election, is a question somewhat in dispute. At least one jurisdiction has held that inasmuch as the agent is originally bound by the contract he can never be released until the obligation is discharged.[7] Some cases have even suggested the analogy of joint tort-feasors. On the other hand, it is impossible, as a matter of truth, to say that the contract was made upon the joint responsibility of agent and principal, for the plaintiff entered into it with no expectation of charging any one but the agent. Furthermore, when he sues one party as solely responsible, he negatives the liability of the other. Granting the correctness of the rule which gives such a plaintiff a direct right of action against either principal or agent, it would seem that the decision is correct in compelling him to elect.

Restrictive Agreements as to Chattels. — The modern tendency towards monopoly has found expression in attempts by manufacturers to maintain minimum retail prices for the sale of their goods. The manufacturer may effectively bind the wholesaler by a direct restrictive agreement; and an attempt is now frequently made to affect likewise the retailer by affixing printed labels to the goods, thereby charging all subsequent transferees with notice of the conditions under which they were originally

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[3] Sessions *v.* Block, 40 Mo. App. 569.
[4] See Thompson *v.* Howard, 31 Mich. 309, 312.
[5] Moller *v.* Tuska, 87 N. Y. 166.
[6] See 2 Bl. on Judg. § 674.
[7] Beymer *v.* Bonsall, 79 Pa. St. 298.

sold. Whether the person into whose hands the goods may come is in equity bound by such restrictions is an unsettled question. In two New York cases[1] — the only authority that has been found — restrictive agreements as to chattels were held binding upon third parties who took with notice. This is in effect an extension to chattels of the so-called doctrine of equitable easements by which covenants restricting the use of land are enforced against purchasers with notice.[2] A recent English case is interesting since it refused to enforce against a retailer certain restrictions contained in labels attached to boxes of tobacco. *Tuddy & Co.* v. *Sterious & Co.*, 20 T. L. R. 102 (Eng., Ch. D.). It is to be regretted that the court gives no reasons for its decision on this point, but in the absence of any special facts to distinguish the case, the bald statement of the court "that conditions of this kind did not run with the goods and could not be imposed on them" may fairly be taken as opposed to the New York decisions.

Whether courts of equity are justified in extending this doctrine to chattels must depend upon the real ground on which restrictive covenants are held to run with land. If, according to the view adopted by some American courts,[3] such restrictions are enforced on the analogy of common law easements, the doctrine is of course wholly inapplicable to chattels. But this analogy is a superficial one.[4] The purchaser's liability in this class of cases is based on the broad equitable principle that wherever equity, as against an original promisor, would have enforced specific performance of an agreement, it will, as against a purchaser with notice, or a volunteer, raise a constructive obligation subjecting him to the terms of that agreement. The purchaser of such land is in the same position as a purchaser from a defaulting trustee, or from an owner of land who had previously contracted to sell it to another. In all these cases, if no relief is given, the original promisee is unjustly impoverished, while the purchaser who takes with notice or without giving value is correspondingly enriched. Given, then, a restrictive agreement as to chattels, of such a nature as to call for specific performance, and there is nothing in the nature of things to prevent it from running with those chattels.

Restrictive agreements between manufacturers and wholesalers, as, for example, the one involved in the recent English case, fall within the rule. Such agreements are not in restraint of trade;[5] consequently the manufacturer, owing to the inadequacy of his damages at law, would be entitled to a decree of specific performance as against the wholesaler. He is likewise entitled to relief against a retailer who takes with notice, unless, as is sometimes suggested, it would be inexpedient for equity to grant such relief. The manufacturer, however, being engaged in private business, is under no legal duty to place his goods on the market. If he chooses to do so, according to modern individualistic notions his right to name the conditions under which those goods shall be sold is absolute; and, so far as the interests of the public are concerned, there can be no more objection to the enforcement of that right against a third party than against the original promisor.

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[1] New York Bank Note Co. *v.* Hamilton, etc., Co., 28 N. Y. App. Div. 411; Murphy *v.* Christian Press, etc, Co., 38 *ibid.* 426.

[2] Tulk *v.* Moxhay, 2 Ph. 774.

[3] Trustees of Columbia College *v.* Lynch, 70 N. Y. 440.

[4] See 5 HARV. L. REV. 274, 276.

[5] Elliman, Sons & Co. *v.* Carrington & Son, Ltd., [1901] 2 Ch. 275; see Heaton-Peninsular, etc., Co. *v.* Eureka Specialty Co., 77 Fed. Rep. 288.

RECENT CASES.

AGENCY — ELECTION TO SUE AFTER-DISCOVERED PRINCIPAL. — In an action against the defendant as after-discovered principal the plea alleged that the plaintiff, with full knowledge of the facts, had begun and was continuing a suit at law against the agent for the same cause of action. *Held*, that the plea states a good bar. *Barrel* v. *Newby*, 36 Chic. Legal News 172 (U. S. C. C. A., Seventh Circ.). See NOTES, p. 414.

BANKS AND BANKING — COLLECTION AND REMITTANCE — FOLLOWING PROCEEDS OF NOTE. — The petitioner deposited a note for $506 with a bank for collection and remittance. On November 21 the bank collected the amount, but did not remit. On December 4 it failed, only $29 in cash going to the receiver. The court below decided that the petitioner had no equitable lien on this amount. The petitioner excepted to this judgment. *Held*, that the judgment is correct. *G. Ober & Sons Co.* v. *Cochran*, 45 S. E. Rep. 382 (Ga.). See NOTES, p. 413.

BOUNDARIES — DIVISION OF A LAKE-BED AMONG LITTORAL OWNERS. — *Held*, that the boundary lines of the littoral owners of a non-navigable pond, the waters of which have disappeared, consist of lines drawn to the center of the pond from the points where the side division lines of the various owners intersect the meandered shore line. *Scheifert* v. *Briegel*, 96 N. W. Rep. 44 (Minn.). See NOTES, p. 410.

CANCELLATION OF INSTRUMENTS — ACTION PENDING AT LAW. — The plaintiff brought action in a state court to recover on an insurance policy. The defendant later in a federal court asked for cancellation of the policy on the ground of fraud, alleging inadequacy of legal remedy in that, because of a state statute, it could not remove the pending state action into a federal court without losing its license to do business in that state, and also, because the law as applied in the federal courts was more favorable to the defendant. *Held*, that the bill for cancellation will not lie. *Cable* v. *United States, etc., Co.*, 24 Sup. Ct. Rep. 74. See NOTES, p. 408.

CARRIERS — LIMITATION OF LIABILITY — AGREED VALUATION. — The plaintiff shipped horses under a contract which provided that the freight payable was proportioned to the declared value of the property carried, and that the carrier limited its liability for damage to the value declared by the shipper. The defendant negligently damaged the horses in transit, but they were sold for more than the declared value. The damage, however, did not exceed the agreed amount. *Held*, that the defendant is liable for the actual damage. *United States Express Co.* v. *Joyce*, Ind., App. Ct., Feb. 4, 1904.

The point thus presented is unusual, but except in the federal courts the decisions generally support the principal case. *Brown* v. *Cunard, etc., Co.*, 147 Mass. 58; *Starnes* v. *Railroad*, 91 Tenn. 516. They seem to proceed on the supposition that the whole purpose of the stipulation is to confine the carrier's liability within the amount specified. It is submitted, however, that the meaning of the clause should not be so restricted. The plaintiff has deliberately fixed the value of his goods at a certain sum as a basis of negotiation. Damage is essential to his recovery; but he cannot show damage unless he is allowed to say that the value of his property is greater than the amount he has thus fixed. This, it would seem, he is estopped to do. *Richmond, etc., R. R. Co.* v. *Payne*, 86 Va. 481. Furthermore, if the amount fixed is to be regarded as a merely arbitrary limit to liability without any real relation to the value of the property, the whole agreement would, according to the weight of authority, be void as against public policy. *Moulton* v. *St. Paul, etc., Ry. Co.*, 31 Minn. 85.

CONSTITUTIONAL LAW — ACTIONS BETWEEN FOREIGN CORPORATIONS ON FOREIGN JUDGMENTS. — The New York Code as interpreted by the New York courts denies the use of the state courts in cases between foreign corporations where the cause of action arises outside of the state, even though the cause of action is a judgment obtained in another state. *Held*, that the Code provision does not violate the provision

of the federal Constitution that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." *Anglo-American Provision Co.* v. *Davis Provision Co.*, 24 Sup. Ct. Rep. 92.

A corporation is not a citizen within the meaning of the federal Constitution. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28. No state is obliged to open its courts for the settlement of foreign disputes between persons not citizens of the United States. *Mexican Nat'l R. R. Co.* v. *Jackson*, 89 Tex. 107. Hence the decision in the principal case appears unquestionable apart from the fact that the action was based on a judgment rendered in a sister state. *Cf. Bawknight* v. *Liverpool, etc., Ins. Co.*, 55 Ga. 194. This additional fact seems immaterial. The constitutional provision that full faith and credit shall be given to such judgments is a rule of evidence only, and does not require that an action shall be allowed on such judgments regardless of other objections to its maintenance. *M'Elmoyle* v *Cohen*, 13 Peters 312; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; see *Huntington* v. *Attrill*, 146 U. S. 657, 672. By refusing to take jurisdiction in the principal case the state courts did not dispute the existence of the cause of action nor deny the validity and conclusiveness of the judgment; they decided only that these foreign parties had no right to enforce any foreign claim in the state courts. Hence, while the question appears never to have been previously adjudicated, the decision is probably sound.

CONSTITUTIONAL LAW — FEDERAL JURISDICTION — ALABAMA FRANCHISE CASES. The Alabama constitution provides for the registration of all electors upon qualification according to certain requirements. The plaintiff, a negro, was denied registration, and, claiming that the registration provisions were in contravention of the Fourteenth and Fifteenth Amendments, brought action to recover damages against the board of registrars, and also applied for a writ of mandamus to compel the board to register him. The Supreme Court of Alabama held that, granting the unconstitutionality of the registration provisions, the board of registrars would then be without authority to register the plaintiff as a voter, and therefore the plaintiff had suffered no legal injury; and that, for the same reason, the board could not be compelled to register the plaintiff. The holdings were taken to the Supreme Court of the United States on writs of error. *Held*, that no federal question is involved. *Giles* v. *Teasley*, U. S. Sup. Ct., Feb. 23, 1904.

The decision is clearly right. No constitutional question was raised for the reason given as the second ground of decision in *Giles* v. *Harris*, 189 U. S. 475. For a discussion of that case, see 17 HARV. L. REV. 130.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — STATUTES RESTRICTING HOURS OF LABOR. — A New York statute rendered it a misdemeanor to require or to permit an employee in a bakery or confectionery establishment to work more than sixty hours per week, or more than ten hours per day unless for the purpose of making a shorter work day on the last day of the week. *Held*, that the statute is constitutional as an exercise of the police power. *People* v. *Lochner*, 177 N. Y. 145.

Legislation restricting the hours of labor is comparatively modern, and its constitutionality has seldom been adjudicated by the courts. Statutes limiting the working hours for minors and women employed in factories have been held constitutional as reasonable regulations to secure the public health. *Commonwealth* v. *Hamilton Mfg. Co.*, 120 Mass. 383; *contra*, *Ritchie* v. *People*, 155 Ill. 98. So also similar statutes affecting the employees in underground mines and smelting works have been held constitutional on account of the peculiarly unwholesome character of the work. *Holden* v. *Hardy*, 169 U. S. 366; *contra*, *In re Morgan*, 26 Col. 415. It is on this ground that a bare majority of the court affirmed the decision in the principal case, which probably goes further than any previous decision with the possible exception of *People* v. *Havnor*, 149 N. Y. 195. The numerous citations from encyclopædias and medical authorities collected in the opinion of Vann, J., at pp. 169–174 would indicate that some reasonable basis existed for considering the occupation peculiarly unhealthful. Consequently the decision that special legislation for this occupation is constitutional appears sound, in view of the fact that a statute is not to be declared void except in a clear case. *Nicol* v. *Ames*, 173 U. S. 509.

CONSTITUTIONAL LAW — POLICE POWER — PROHIBITION OF POSSESSION OF FISH DURING CLOSE SEASON. — The defendant, which had in its possession fish imported from Canada, was sued under a penal statute prohibiting such possession during the close season. *Held*, that this prohibition is unconstitutional. *People* v. *Booth*, 30 N. Y. L. J., 1409 (N. Y. Sup. Ct.).

The court went principally on the ground that the statute enforced a deprivation of property rights. It is well settled that the protection of the public interest in game is

an appropriate occasion for police regulation. *Cf. Phelps* v. *Racey*, 60 N. Y. 10, 14. Rights in personal property are commonly restricted under the police power if the property in question is in itself a menace to the public interest, or if it is an implement apt to be used to the detriment of such interest. *State* v. *Smyth*, 14 R. I. 100; *Lawton* v. *Steele*, 152 U. S. 133. Neither of these circumstances appears in the principal case; the sole relation of the prohibitory statute to the public good lay in the fact that its enforcement would make it difficult for persons entirely unconnected with the fish in question to kill state fish in violation of the law. This consideration has been held to justify similar statutes. *Commonwealth* v. *Gilbert*, 160 Mass. 157; *Magner* v. *People*, 97 Ill. 320. Similarly, a statute prohibiting the hauling of cotton after nightfall, the object being to prevent stealing from cotton fields, was upheld. *Davis* v. *State*, 68 Ala. 58. When the necessity for police regulation exists, it is submitted that the legislature should not be hampered in the selection of the means to be employed. The position of the court is, however, supported by *dicta*. See *People* v. *O'Neil*, 71 Mich. 325. The statute was also considered an interference with foreign commerce. As to this point, see 4 HARV. L. REV. 221; *cf.* 31 U. S. Stat. at Large, c. 553, p. 188.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — LEGISLATIVE CONTROL OF MUNICIPAL CONTRACTS. — A Kansas statute provides that no person, in performing any contract with a municipality of the state, may require from an employee more than eight hours of work per day. *Held*, that the statute is constitutional. *Atkin* v. *Kansas*, 24 Sup. Ct. Rep. 124.

A New York statute provides that the wages to be paid on all public work shall be no less than the prevailing rate in the locality where such work is carried on. *Held*, that, as applicable to employees of a municipality, the statute is constitutional. Bartlett, Vann, and O'Brien, JJ., dissented. *Ryan* v. *City of New York*, 177 N. Y. 271.

State courts have so uniformly held such statutes unconstitutional that *Atkin* v. *Kansas* is the first case taken to the federal Supreme Court. The decision is based on the theory that since municipalities are mere political subdivisions of the state, agents to exercise a part of its powers, the state may control all municipal contracts, whether relating to internal affairs or not. This must mean that local self-government in this country exists not by constitutional right, but only by legislative sufferance. The court cites no decision to support its conclusion, and few exist, though *dicta* to that effect are frequent. See the authorities collected in 13 HARV. L. REV. 441. On the other hand, the court ignores numerous decisions to the effect that in matters of local concern a municipality acts, not in a governmental, but rather in a corporate capacity, in which it is as free from state control as a private corporation. *People* v. *Hurlbut*, 24 Mich. 44; 1 DILL. MUNIC. CORP., 3rd ed., § 66, n. 1. This latter view has been adopted in New York with reference to a statute similar to that of Kansas. *People* v. *Orange, etc., Co.*, 175 N. Y. 84. Yet in *Ryan* v. *City of New York*, *supra*, the reasoning of *Atkin* v. *Kansas* is expressly approved. The court professes to distinguish its two decisions on the ground that one statute restricts the liberty of the city, the other the liberty of persons contracting with the city. But in providing that contractors may exact only an eight-hour day the state is merely laying down one provision of contracts with cities which contractors may make or not as they please. It is on this reasoning that the Kansas statute was sustained. The New York Court of Appeals, therefore, seems committed to the questionable proposition that the state may prescribe the terms of the city's contract with its contractor, but not the terms of the contractor's contract with the city.

CONSTITUTIONAL LAW — RETROACTIVE LAWS — REPEAL OF STATUTE UNDER WHICH RIGHTS HAVE VESTED. — At common law in Massachusetts no right of action could arise out of contracts for the purchase of stock on margin. A statute of 1890 allowed recovery of money paid on such contracts under certain circumstances. An amendment in 1901 added to the requisites for recovery. In consequence of a transaction occurring before the amendment, the plaintiff had a right of action according to the original statute, but not according to the amended statute. *Held*, that the plaintiff cannot recover. *Wilson* v. *Head*, 69 N. E. Rep. 317 (Mass.).

Though the amendment is silent as to rights acquired before its passage, the court construed it as intended to bar such rights. Yet the cases are numerous and practically unanimous to the effect that, even aside from constitutional obstacles to retroaction, a statute has a purely prospective operation unless a purpose to give it retrospective force is clearly expressed. ENDLICH: INTERP. STATS. § 271, and cases cited. And the courts will go much further to construe a statute as prospective where, if retroactive, it might be unconstitutional. *Creighton* v. *Pragg*, 21 Cal. 115; see *Charter* v. *Ives* 55 Pa. St. 81. For this reason there are few actual decisions as to when statutory rights of action are so vested as to be constitutionally protected; and

these few decisions are in conflict. *Van Imwagen* v. *Chicago*, 61 Ill. 31; *Rock Hill College* v. *Jones*, 47 Md. 1, 17. The true rule seems to be that where the party asserting the right given by a remedial statute need do nothing more to perfect it, it cannot be barred by subsequent legislation. See *Steamship Co.* v. *Jolliffe*, 2 Wall. (U. S.) 450. After the repeal of a penal statute of course a private person cannot recover a forfeiture any more than a state can recover a fine. *Norris* v. *Crocker*, 13 How. (U. S.) 429. The statute was purely remedial in the principal case. *Wall* v. *Metropolitan Exchange*, 168 Mass. 282. The decision therefore seems questionable on both the points involved.

CONSTITUTIONAL LAW — TAXATION OF EXPORTS. — An act of Congress imposes a tax upon all filled cheese manufactured in the United States. *Held*, that the tax may be constitutionally imposed upon cheese manufactured for exportation. *Cornell* v. *Coyne*, U. S. Sup. Ct., Feb. 23, 1904.

The precise point involved in the principal case appears not to have been decided previously. There have been, however, *dicta* in other decisions of the Supreme Court, that the only effect of the constitutional prohibition against taxing exports is to prevent taxation of goods in process of exportation, and taxation which discriminates against articles which are to be exported. See *Coe* v. *Errol*, 116 U. S. 517; *Turpin* v. *Burgess*, 117 U. S. 504. The principal case is consistent with these expressions of judicial opinion, for the statute in question applies without distinction to goods manufactured for domestic and for foreign consumption, and the tax is to be levied before shipment. *Cf. Coe* v. *Errol*, *supra*. The decision seems, moreover, to be justified by the purpose of the constitutional provision, which is apparently intended merely to give freedom to export trade, not to establish discriminations in its favor.

CONTRACTS — CONTRACT BY TELEPHONE — PLACE OF MAKING. — In an action on a contract made by telephone, the offerer and acceptor being in different counties, it became important to determine at which end of the line the contract was made. *Held*, that the contract is made at the acceptor's end of the line. *Bank of Yolo* v. *Sperry Flour Co.*, 74 Pac. Rep. 855 (Cal.).

Following the doctrine that a contract made by the exchange of letters is completed at the time and place of mailing the letter of acceptance, it is held that a contract made by telegraph is completed on the filing of the telegram of acceptance. *Garrettson* v. *North Atchison Bank*, 47 Fed. Rep. 867. By the principal case the same doctrine is extended to contracts made by telephone. Logically it follows that the contract is completed whether or not the acceptance is transmitted to the offerer; all that is necessary is that the acceptor should speak into his transmitter in the ordinary manner. Parties contracting by telephone are in much the same position as parties contracting face to face, and in one case as well as the other the acceptor should act as a reasonable man in conveying his acceptance to the offerer. Whether or not the effectiveness of the telephone is such that speaking into a transmitter may reasonably be looked upon as an acceptance is a doubtful question upon which there well may be a difference of opinion.

CONTRIBUTORY NEGLIGENCE — SAVING LIFE OF THIRD PERSON — NEGLIGENCE OF PERSON SAVED AS BAR TO RECOVERY. — Through the negligence of the defendant's servants a woman was in imminent danger of being run over by a car. The plaintiff, in rescuing her, was himself injured. There was evidence that the woman was contributorily negligent in being on the track. *Held*, that her negligence will not bar recovery. *Pittsburg, etc., Ry. Co.* v. *Lynch*, 68 N. E. Rep. 703 (Oh.).

A plaintiff injured in attempting, with risk to himself, to save a third person from danger caused wholly by the defendant's negligence can recover from the defendant, although under ordinary circumstances his recovery would be barred by contributory negligence. *Eckert* v. *Long Island R. R. Co.*, 43 N. Y. 503. The defense of contributory negligence is based upon the injustice of allowing a plaintiff to recover for an injury caused in part by his own fault. But the law regards human life so highly that it does not look upon the incurring of a risk in order to save life as a fault. No previous case has been found in which the third person's danger was caused partly by his own negligence. It would seem, however, that the value of a person's life is not materially decreased because he has been careless It follows that one who runs a risk to save a negligent person from danger should not be considered at fault, and should not be barred from recovery for injury of which the defendant's negligence is one of the causes.

CORPORATIONS — BILL BY MINORITY STOCKHOLDERS — RECOVERY OF ATTORNEY'S FEES. — Minority stockholders of a corporation successfully maintained a bill in equity to restrain and cancel an attempted transfer of the entire corporate property.

Held, that they are entitled to attorney's fees. *Forrester* v. *Boston, etc., Co.*, 74 Pac. Rep. 1088 (Mont.).

It has generally been held that where a person, by a bill to secure the due application of a fund in which he is interested, succeeds in bringing it under control of the court for the common benefit of all concerned, he is entitled to his costs and counsel fees before its distribution, *Trustees* v. *Greenough*, 105 U. S. 527; so in the case of a bill by creditors of a corporation bringing into court its property fraudulently transferred. *Central R. R.* v. *Pettus*, 113 U. S. 116. Where also a minority stockholder by his bill increased the assets of the corporation by obtaining a reconveyance of property fraudulently transferred, he was allowed attorney's fees. *Grant* v. *Lookout Mountain Co.*, 93 Tenn. 691. Where the stockholder succeeds in preserving the assets of the corporation by preventing a wrongful conveyance, the same reasons exist for allowing the recovery of attorney's fees. *Meeker* v. *Winthrop Iron Co.*, 17 Fed. Rep. 48; *contra*, *Alexander* v. *Atlanta, etc., R. R. Co.*, 113 Ga. 193. Such is the result reached in the principal case. Unfortunately the scandal connected with the Montana copper cases, of which this is one, may weaken it as an authority.

Corporations — Ultra Vires — Capacity of National Bank to Become Partner. — A debtor of the defendant national bank conveyed to it as security transferable shares in a partnership. The bank shared in the management of the partnership, which thereafter contracted debts and became insolvent. The plaintiff seeks to hold the bank liable as a partner. Some of the partners were insolvent. *Held*, that the bank is not a partner but a part owner liable for only its proportional share of the debts. *Merchants' National Bank* v. *Wehrmann*, 68 N. E. Rep. 1004 (Oh.). See Notes, p. 407.

Deceit — Negligence of Plaintiff as Defense. — The defendant, to induce the plaintiff to buy a stock of goods, gave him an inventory showing a total value much larger than the figures actually footed up. The plaintiff had only to cast up the column of hundreds to detect the error. It was proved that he was a man of exceptional shrewdness in business dealings. *Held*, that an instruction to the jury in an action of deceit that the plaintiff is required to exercise ordinary care and prudence is harmless error, as the defendant is held up to his own standard of care, which was above the ordinary. *Kaiser* v. *Nummerdor*, 97 N. W. Rep. 932 (Wis.).

The court holds that the doctrine of contributory negligence has no application to the law of deceit, and contends that the plaintiff is required, not to exercise ordinary care, but to give attention to what is before him according to his own standard in business dealings. Although the substitution of the personal for the ideal standard of the man of ordinary prudence has the advantage of giving opportunity to hold rogues liable for frauds practised upon the weak-minded and inexperienced, still the holding of the court is open to objection on principle. Deceit like battery is a wilful injury, and the rule, well settled in the latter case, that the law imposes no duty of care upon the victim, would seem to apply with equal force to the former. *Steinmetz* v. *Kelly*, 72 Ind. 442. There is a tendency among the authorities to recognize this view. *Dobell* v. *Stevens*, 3 B. & C. 623; *Speed* v. *Hollingsworth*, 54 Kan. 436. But it must be acknowledged that a great majority of the cases hold that the plaintiff may be barred by negligence. *Slaughter's Administrator* v. *Gerson*, 13 Wall. (U. S.) 379; *Poland* v. *Brownell*, 131 Mass. 138.

Easements — Extent of Public Easement in Highway. — The Boston Transit Commission proposed, under legislative authority, to construct a subway under certain public streets in which the plaintiffs owned the fee, without a formal taking of the land. *Held*, that the plaintiffs are not entitled to an injunction to restrain such action, since the subway is not an additional servitude. *Sears* v. *Crocker*, 69 N. E. Rep. 327 (Mass.). See Notes, p. 409.

Evidence — Admissibility of Rules of Railway Company to Prove Negligence. — *Held*, that evidence of violation of rules of a street railway company by its motorman is admissible to prove negligence toward a person injured. *Stevens* v. *Boston Elevated Ry. Co.*, 32 Banker & Tradesman 130 (Mass. Sup. Ct., Jan., 1904).

The court decides upon authority and upon the analogy of cases allowing the violation of statutes to be shown as evidence of negligence. This analogy is obviously unsound, for, whereas a statute establishes a duty to the public, the rules of a railway regulate only the obligations of employee to employer. The weight of authority, it is true, favors the decision. *Cincinnati St. Ry. Co.* v. *Altemeier*, 60 Oh. St. 10. But the contrary view is not without support. *Fonda* v. *St. Paul City Ry. Co.*, 71 Minn. 438. The cases which admit the evidence let it in as part of the *res gestæ* and as an admission against interest. On the other hand, regulations made after the accident are

almost uniformly excluded on grounds of irrelevancy and expediency. *Columbia R. R. Co.* v. *Hawthorne*, 144 U. S. 202. How the making of regulations can be an admission in one case and not in the other, or how expediency demands exclusion in one case and not in the other, is not clear. Since the care of the average man is the test of negligence, it is difficult to see how a railway's private standard of care as expressed in its rules can be relevant in either case. See *Davis* v. *Manchester*, 62 N. H. 422.

EVIDENCE — REAL EVIDENCE — POWER TO COMPEL PHYSICAL EXAMINATION OF WITNESS. — In an action by a physician to recover for services rendered a railroad in a wreck, a witness refused to exhibit to the jury his leg which had been injured in the wreck and treated by the plaintiff. *Held*, that the court cannot compel him to exhibit his leg. *McKnight* v. *Detroit, etc., Ry. Co.*, 97 N. W. Rep. 772 (Mich.).

By the weight of authority in this country, the court may, within bounds of decency, compel the plaintiff as witness in an action for personal injuries to exhibit the injured part of the body to the jury or to submit to examination by competent persons. *Graves* v. *City of Battle Creek*, 95 Mich. 266; *contra*, *Union Pacific Ry. Co.* v. *Botsford*, 141 U. S. 250. The principal case explains this on the ground that by the plaintiff's appeal for justice he impliedly agrees to disclosures necessary to attain justice. But, it is submitted, the true basis is the lack of any privilege of witnesses in this respect, because the law regards the advancement of justice as more important than personal immunity from examination. One example of this attitude of the common law is the writ *de ventre inspiciendo* to determine the possibility of a posthumous heir. *In re Blakemore*, 14 L. J. Ch. N. S. 336. If this is so, the principal case, which is apparently one of first impression, should be differently decided.

EVIDENCE — TESTIMONY GIVEN AT FORMER TRIAL — LACK OF JURISDICTION. The New York Code provides that evidence given in a former action or special proceeding may be read in a subsequent trial of the same subject matter between the same parties if the witness has died since the former action. In the present case the referee before whom the evidence in the former proceeding was given was later held to have acted without jurisdiction. *Held*, that the evidence is not admissible in the subsequent trial. *Deering* v. *Schreyer*, 88 N. Y. App. Div. 457.

The provision of the Code is substantially declaratory of the common law. The chief objections to hearsay evidence do not apply to the testimony of deceased witnesses given in a former trial between the same parties concerning the same subject matter; for the testimony has been given under oath, and the witness has been subject to cross-examination. *Minneapolis Mill Co.* v. *Minneapolis, etc., Ry. Co.*, 51 Minn. 304, 315. Hence such testimony is very generally held admissible. *Yale* v. *Comstock*, 112 Mass. 267. It might appear at first sight to be immaterial whether the ground for setting aside the result of the former proceedings was lack of jurisdiction or some other cause. Yet the defect in jurisdiction has clearly a different bearing from that of most other defects in procedure. For if the court in the former proceeding had not jurisdiction the parties were under no obligation to appear, nor could they be in any way concluded by the result; nor was the witness bound by his oath. *Collins* v. *State*, 78 Ala. 433. Hence, while no decision directly in point has been found, the conclusion reached appears to be entirely sound. See *State* v. *Johnson*, 12 Nev. 121, 124.

EXECUTORS AND ADMINISTRATORS — OBLIGATION OF DISTRIBUTEE TO REFUND — PAYMENT UNDER MISTAKE OF FACT. — The plaintiff, an ancillary administrator in West Virginia, believing that there were no creditors of the deceased in that state, remitted the assets to the domiciliary administrator in Virginia. The latter partially distributed the estate. Having been forced to pay a judgment subsequently obtained by a West Virginia creditor of the estate, the plaintiff sued a Virginia distributee for contribution. *Held*, that the plaintiff can recover. *McClung* v. *Sieg*, 46 S. E. Rep. 210 (W. Va.).

Ordinarily, an executor paying a legatee or distributee is bound by his admission that the assets are sufficient and cannot force either to refund. *Bumpass* v. *Chambers*, 77 N. C. 357. But overpayment under innocent mistake of fact gives an executor a right at law for money had and received. *Northrop* v. *Graves*, 19 Conn. 548. The West Virginia administrator in the principal case, therefore, could have forced a West Virginia distributee to refund. But it is hard to see how he can get any such right against the distributee in Virginia. The domiciliary administrator in Virginia is the person to whom the money has been paid under mistake of fact, and who is therefore under a liability to pay it back. He may still retain enough of it to indemnify the plaintiff. The latter should be forced to exhaust his remedy against him before coming against the distributee. *Selover v. Coe*, 63 N. Y. 438.

FEDERAL COURTS — VENUE — SUIT BY ASSIGNEE OF CHOSE IN ACTION. — A West Virginia corporation assigned to the plaintiff, a New York citizen, a cause of action against the defendant, a Pennsylvania corporation. In an action brought by the plaintiff in the federal circuit court in the district of his residence, the defendant entered a general appearance, but moved to set aside the summons for lack of jurisdiction as the action was not brought within the residence of either the assignor or the defendant. The Judiciary Act, Aug. 13, 1888, c. 866 (1 Supp. U. S. Rev. Sts. 612) provides that in suits in the circuit courts between citizens of different states "suit shall be brought only in the district of the residence of either the plaintiff or the defendant"; and that no circuit court shall "have cognizance of any suit . . . unless such suit might have been prosecuted in such court . . . if no assignment or transfer had been made." *Held*, that the court has jurisdiction. *Bolles* v. *Lehigh Valley R. R. Company*, U. S. C. C., S. D. N. Y., Feb. 9, 1904.

The main purpose of the statute in question is to deny to the circuit courts jurisdiction over assigned causes of action when diversity of citizenship is lacking, either between the original parties or between the present plaintiff and the defendant. *Portage City Water Company* v. *Portage*, 102 Fed. Rep. 769. Clearly this purpose is not violated by allowing the present action to be maintained. Moreover, the result is not inconsistent with any provision of the statute. Were the present plaintiff the assignor instead of the assignee, the defendant, having entered a general appearance without objection, would be within the jurisdiction of the present court, because the clause providing that action shall be brought only at the residence of the plaintiff or the defendant concerns not jurisdiction but merely procedure: like personal privilege, it is waived when the defendant enters a general appearance without objection. *Interior Construction, etc., Co.* v. *Gibney*, 160 U. S. 217. Since the action might thus be brought in the present court had there been no assignment, and since diversity of citizenship exists between the assignee and the defendant, the assignee can maintain the action in this case.

ILLEGAL CONTRACTS — MARRIAGE BROKERAGE CONTRACTS. — The plaintiff filed a bill to foreclose a mortgage given by the defendant to secure a debt, containing the condition that it should be void and the debt extinguished if one Revett, who was about to marry the plaintiff's daughter, should do so at once, and should faithfully perform the marriage contract for six years. No performance of the condition except the marriage itself was ever made. *Held*, that the mortgage cannot be foreclosed, since it forms a part of an illegal transaction. *Jangraw* v. *Perkins*, 56 Atl. Rep. 532 (Vt.).

Agreements to bring about marriage between persons not already engaged to be married have always been considered against public policy, illegal, and void. *Johnson's Adm'r* v. *Hunt*, 81 Ky. 321. The reasons given, that such contracts increase the chances of unhappy marriages, apply equally to agreements to hurry through a marriage between persons who have agreed to marry but still have the chance to reconsider. *Morrison* v. *Rogers*, 115 Cal. 252. The object of giving and receiving the mortgage in the principal case was not only to secure a debt but also to hasten the marriage of the plaintiff's daughter. This illegality of one of the essential objects of the agreement vitiates the entire transaction. *Bishop* v. *Palmer*, 146 Mass. 469.

INTERNATIONAL LAW — ALLEGIANCE — STATUS OF PORTO RICANS. — The petitioner in *habeas corpus* proceedings, a native Porto Rican, was detained under a statute authorizing immigration officers to prevent the landing of any alien likely to become a public charge. *Held*, that the petitioner is not an alien. *Gonzales* v. *Williams*, 24 Sup. Ct. Rep. 177. See NOTES, p. 412.

MASTER AND SERVANT — FELLOW SERVANTS — FELLOW SERVANT OFF DUTY. — A section hand employed by the defendant was boarded and lodged at the section house situated upon the defendant's premises. He left the house one evening after working hours by the path used by the section hands, and in crossing one of the tracks was killed through the negligent operation of cars by the defendant's servants. *Held*, that his administrator cannot recover. *Dishon* v. *Cincinnati, etc., Ry. Co.*, 126 Fed. Rep. 194 (Circ. Ct., E. D. Ky.).

The only question in the case is whether the plaintiff's intestate, being off duty at the time of the accident, was a fellow servant of the operatives in charge of the cars. The court appeals to the commonly accepted reason underlying the fellow servant rule, namely, that the employee assumes at the outset the risks of the employment, including the negligence of his fellow servants. *Farwell* v. *Boston, etc., R. R. Corp.*, 4 Met. (Mass.) 49. It seems a fair contention that this assumption of risk extends to times when the servant, though not on duty, is in pursuance of a right enjoyed only by

virtue of his contract of service. This view is well supported upon authority. *Ewald* v. *Chicago, etc., R. R. Co.*, 70 Wis. 420; *International, etc., Ry. Co.* v. *Ryan*, 82 Tex. 565. The cases cited against it are nearly all cases where a servant was injured while being conveyed to or from work upon his master's vehicle. *Dickinson* v. *West End St. Ry. Co.*, 177 Mass. 365; *McNulty* v. *Pennsylvania R. R. Co.*, 182 Pa. St. 479. It seems quite possible to distinguish most of them upon the ground that the parties by their own agreement stood in the relation to each other of carrier and passenger.

RAILROADS — JUDGMENT LIEN — SALE ON EXECUTION OF PORTION OF ROADBED. A railroad company, having constructive notice of a judgment lien on a piece of land, bought it and used it for railroad purposes. *Held*, that the land may be decreed to be sold to satisfy the lien. *Fulkerson* v. *Taylor*, 46 S. E. Rep. 309 (Va.); *Flanary* v. *Kane*, 46 S. E. Rep. 312 (Va.).

It is usually held that the lien of a judgment creditor of a railroad corporation attaches to the whole property, including the franchise, and that detached portions of the roadbed cannot be sold in satisfaction. *Georgia* v. *Atlantic, etc., R. R. Co.*, 3 Woods (U. S. C. C.) 434. It is said that the property and the franchise must be kept together to protect the interests of the public in the continued operation of the highway. In one case at least this rule has been applied to a vendor's lien arising from the sale of land. *Dayton, etc., R. R. Co.* v. *Lewton*, 20 Oh. St. 401. But the usual holding is that the vendor has a lien enforceable by the sale of the particular piece of land conveyed by him. *Walker* v. *Ware, etc., Ry. Co.*, L. R. 1 Eq. 195. The decision in the principal case seems clearly correct, for the lien holder has no direct right against the railroad company. He has a vested right against the land, and a denial of such right in the interest of the public without a taking under the power of eminent domain is unjustifiable. The decision is in accord with the only case found squarely in point. *Chapman* v. *Pittsburgh, etc., R. R. Co.*, 26 W. Va. 299.

RES JUDICATA — MATTERS CONCLUDED — JUDGMENT ON A FORMER JUDGMENT. In 1896 a Kentucky circuit court decided that the Hewitt Law constituted an irrevocable contract exempting the defendant bank from certain taxes. In 1898, in a suit between the same parties, a federal court enjoined the attempt to collect the tax for future years, holding the judgment of 1896 *res judicata* on the question of the existence and validity of the contract. Subsequently the Kentucky Court of Appeals, in reversing the judgment of 1896, decided that no irrevocable contract existed, and the case was remanded. In the new trial the bank introduced the decree of 1898 as rendering the irrevocability of the contract *res judicata*. *Held*, that the decree rendered the irrevocability of the contract *res judicata*. *Deposit Bank* v. *Board of Councilmen*, 24 Sup. Ct. Rep. 154. See NOTES, p. 406.

RESTRICTIVE AGREEMENTS — CHATTELS SOLD BY MANUFACTURER WITH RESTRICTIONS AS TO RETAIL PRICE. — The plaintiff company, manufacturers of tobacco, was accustomed to sell goods to wholesale dealers subject to certain conditions fixing minimum retail prices for the sale of the goods. In order to charge retail dealers with notice of the conditions of the original sale, a label setting forth those conditions was affixed to each box of tobacco. This action was brought against the defendant company, a firm of retail dealers, to restrain it from disregarding the conditions. *Held*, that such restrictions are not binding upon the defendant company. *Taddy & Co.* v. *Sterious & Co.*, 20 T. L. R. 102 (Eng., Ch. D.). See NOTES, p. 415.

SALES — INADEQUACY OF PRICE AS GROUND FOR VACATING SHERIFF'S SALE. — At an execution sale to satisfy a judgment in favor of a firm, one of the partners purchased for $140 land worth $2000. The execution defendant filed a motion to have the sale set aside because of inadequacy of consideration. *Held*, that the sale will be set aside. *Gimmons* v. *Sharpe*, 35 So. Rep. 415 (Ala.).

It is a general principle that inadequacy of price is not of itself sufficient ground for setting aside a sheriff's sale. *Cooper* v. *Galbraith*, 3 Wash. (U. S. C. C.) 546. Many courts, however, because of their reluctance to see the debtor's property sacrificed, have held that where the inadequacy is so gross as to shock the conscience it may be regarded as evidence of fraud, and in such cases the slightest additional circumstance indicating fraud, unfairness, or irregularity of process has been held sufficient to invalidate the sale. *Graffan* v. *Burgess*, 117 U. S. 180. A few courts have held that it is the sheriff's duty not to sell for a grossly inadequate price and on that ground alone have granted relief. The principal case relies upon such a decision. See *Henderson* v. *Sublett*, 21 Ala. 625. It would seem, however, that while the sheriff might be liable for a breach of such duty, it would afford no ground for depriving the innocent

purchaser of his bargain. In jurisdictions allowing the execution defendant a right of redemption, there can be no need to set a sale aside because of inadequacy of price. *Mixer* v. *Sibley*, 53 Ill. 61.

SALES — SALE OF STANDING TREES — CONSTRUCTION OF CONTRACT. — The plaintiff sold and conveyed to the defendant's assignor all the standing trees of a certain size on the plaintiff's land. The contract allowed the buyer five years within which to cut and remove the timber, the term to commence when the buyer began to manufacture the timber into lumber. Thirteen years after the contract, the defendant cut and removed the trees. *Held*, that the plaintiff may recover in trespass the value of the trees. *Bunch* v. *Elizabeth City Lumber Co.*, 46 S. E. Rep. 24 (N. C.). See NOTES, p. 411.

TITLE AND POSSESSION — MASTER'S RIGHTS TO GOODS FOUND BY SERVANT. — The plaintiff while cleaning out an old building for the defendant unearthed a sum of money, of which the defendant took possession. The owner of the money was unknown. *Held*, that the plaintiff can maintain trover for the money. *Danielson* v. *Roberts*, 74 Pac. Rep. 913 (Ore.).

The question raised in the principal case has been differently decided in England. *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44. The reasoning of the court in that case has been criticised. See 10 HARV. L. REV. 444. The result, however, is believed to be sound. It may be conceded that in general the mere fact that a chattel is found upon another's premises or by one in his employ does not alter the right of the finder to the possession of the chattel. *Bridges* v. *Hawkesworth*, 21 L. J. Q. B. 75; *Hamaker* v. *Blanchard*, 90 Pa. St. 377. But where it can fairly be assumed that a part of the servant's duty is to find for the master on his premises, the latter's right to hold the thing found as against every one but the true owner should be absolute. This distinction seems to have been taken by the English courts. *Regina* v. *Pierce*, 6 Cox C. C. 117; *McDowell* v. *Ulster Bank*, 33 Ir. L. T. 225. In the principal case the nature of the plaintiff's employment makes it reasonable to assume the existence of such a duty, and the decision is therefore questionable.

TITLE AND POSSESSION — RIGHT TO POSSESSION OF UNCLAIMED ARTICLES FOUND IN SHOP. — The plaintiff found a jewelled pin on the counter of the defendant's shop. She showed it to the superintendent, who took the pin to examine and refused to give it back, saying that he would keep it for the owner. No owner having appeared, the plaintiff claims the pin. *Held*, that the plaintiff is entitled to possession. *White* v. *Daniels*, 30 N. Y. L. J. 1223 (Munic. Ct., City of New York, Seventh Dist.).

Since the possessor of a chattel has a right to it good against all the world but the true owner or those claiming under him, the rights of the parties should depend on who first got possession. Power of control and an intention to make a use inconsistent with control by any one else, are the distinctive attributes of possession. See 6 HARV. L. REV. 443. The defendant here had no actual intent to assume control to the exclusion of others; and as he invited the public to his shop, such an intent cannot be implied as part of a general intent to exclude people from the premises. *Cf. South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44. Some cases hold that if chattels are put intentionally in a place and forgotten, they are in the care of the person owning the premises. *Kincaid* v. *Eaton*, 98 Mass. 139. The conclusive answer is that the owner of the premises never consented to responsibility for them. The pin therefore remained in the constructive possession of the original owner until the plaintiff took actual possession of it.

TORTS — INJURY TO LICENSEE — CONDITION OF PREMISES. — The defendant, a railroad corporation, tacitly allowed the public to use the space between its tracks as a way. Just before reaching an unguarded cut, the path diverged across the track. The plaintiff, who was using the path at night, did not know that it diverged, and not seeing the cut in the darkness, fell into the opening, and was injured. *Held*, that the plaintiff may recover. *Matthews* v. *Seaboard, etc., Ry.*, 46 S. E. Rep. 335 (S. C.).

It is not entirely clear from the decision whether the court proceeded on the assumption that the defendant was to be considered as inviting, or merely as permitting the plaintiff to use the way in question. The law is in some conflict whether upon these facts an invitation could be implied; but the weight of authority holds that the mere passive acquiescence by a landowner in the use of his premises by the public can never amount to an invitation. *Lingenfelter* v. *Baltimore, etc., Ry. Co.*, 154 Ind. 49. But if the plaintiff is to be considered as a bare licensee, the position of the court is clearly

untenable. A licensee assumes all the risks which result from the defective condition of the premises except hidden dangers of which the licensor is aware and he himself is ignorant. *Gautret* v. *Egerton*, L. R. 2 C. P. 371. And it seems clear that defects of long standing are not considered as hidden dangers within the meaning of the rule when they are concealed only by reason of the darkness of the night. *Reardon* v. *Thompson*, 149 Mass. 267; *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 731.

TRUSTS — CONVEYANCE TO TRUSTEE FOR ONE OF TWO EQUITABLE CLAIMANTS. The plaintiff and the *cestui que trust* of a trustee each had equitable rights to property the legal title to which was in the trustee, of which rights the plaintiff's was the prior. The trustee conveyed the property to the defendant, who agreed to hold it for the benefit of the *cestui*. No notice of the plaintiff's rights on the part of the defendant or *cestui* was shown. A bill was filed to have the defendant declared trustee of the property for the plaintiff. *Held*, that the defendant, since he is not a purchaser for value, cannot hold the property as against the plaintiff. *Seacoast R. R. Co.* v. *Wood*, 56 Atl. Rep. 337 (N. J. Ch.).

If the holder of the legal title to trust property conveys to the second equitable claimant who is ignorant of the prior equity, the latter may retain the title. *People* v. *Swift*, 96 Cal. 165. The theory is that as each is entitled in justice to the property, equity will not disturb him who gets the legal title in good faith. In the principal case, however, the *cestui* did not himself get title. But if a purchaser for value without notice from a trustee has the conveyance made to a third person in trust for him, such person can hold the title. *Willoughby* v. *Willoughby*, 1 T. R. 763; *Stokes* v. *Riley*, 121 Ill. 166. In these cases the third person is a mere depository of the legal title to which the purchaser has otherwise the exclusive right. The title cannot be disturbed without wronging the *bona fide* purchaser, and for that purpose equity will not lend its aid. The present case seems similar in principle. As against the plaintiff, the *cestui's* right to have the legal title held for him by the defendant should be considered complete.

WATERS AND WATERCOURSES — PERCOLATING WATERS — RIGHT TO APPROPRIATE. — The defendant company sunk a well on its own land and used the water to supply its locomotives and machine shops, thereby cutting off all percolating water from the plaintiff's well, which had been used for domestic purposes only. *Held*, that the defendant company must be limited to the reasonable use of such water in connection with the use of its land, as land. *East* v. *Houston & T. Cent. R. R. Co.*, 77 S. W. Rep. 646 (Tex., Civ. App.).

This decision gives the support of Texas to the view prevailing in New York, California, and New Hampshire. For a discussion of the question, see 16 HARV. L. REV. 295.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

PROOF OF ALIBI TO RESIST EXTRADITION. — Section 5278 of the Revised Statutes of the United States requires that upon a demand for the surrender of any person as a fugitive from justice, made by the executive of any state from which such person has fled, and upon the production of a certified copy of an indictment or affidavit charging the fugitive with crime in the demanding state, the executive of any state to which he has fled shall cause his arrest and surrender. It thus becomes the duty of a governor upon whom a requisition is made to determine, first, whether the indictment or affidavit charges a crime within the demanding state; and, second, whether the person demanded is a fugitive from the justice of that state. *Roberts* v. *Reilly*, 116 U. S. 80. SPEAR, EXTRADITION, 2d ed., 432. As the language of the Constitution and of the Act of Congress seems to make it essential that the person shall have fled from the demanding state, it is held that a constructive presence within the state at the time of the crime, as when a murderous shot is fired over the boundary line, is not enough to warrant extradition. Actual presence being a condition precedent to his liability to extradition, the alleged fugitive is entitled to insist on proof of it. *Ex parte Reggel*, 114 U. S. 642. *Hyatt* v. *People ex rel. Corkran*, 23 Sup. Ct. Rep. 456. And it seems equally his right to offer evidence to the contrary, either before the governor or at the hearing on a writ of *habeas corpus*. The averments of the indictment or affidavit should be *prima facie* proof and nothing more. See 13 HARV. L. REV. 141. *Contra*, *Ex parte Swearingen*, 13 S. C. 74. It is plain that the actual guilt or innocence of the fugitive is no legitimate subject of inquiry at the requisition proceedings. *In re Clark*, 9 Wend. 212. To compel the demanding state to prove its case before the governor of another state is obviously beyond the intention of the act. Evidence offered by the alleged fugitive to prove an *alibi*, as such, is therefore quite immaterial. If, for example, while admitting that he was within the state at the time of the alleged crime, he declares that he was in a different city, the allegation is irrelevant. But it seems clear that the fugitive cannot be denied his constitutional right to show facts taking him out of the scope of the Extradition Act merely because the same facts happen to prove that he did not commit the crime.

An oversight of this last consideration seems to be the basis of a recently published criticism of the course taken by Governor Odell, of New York, in relation to the well-known Ziegler case. *Right of Accused to Resist Extradition by Proving an Alibi*. Anon. 58 Central L. J. 121 (Feb. 12, 1904). Being convinced by the evidence offered by the alleged fugitive that the latter was not in Missouri on the dates stated in the indictment, the governor refused to grant the extradition. It seems to have been clear that Ziegler was in Missouri several days later than the date alleged in the indictment, and also about two months earlier, and the writer in the Central Law Journal finds this circumstance important.

But it has been distinctly held that a going to and coming away from the state subsequent to the crime, there being no actual presence at the time of the crime, cannot be considered a flight within the meaning of the Act. *Hyatt* v. *People ex rel. Corkran*, *supra*. Nor does there seem to be any stronger reason to contend that presence in and departure from the state before the commission of the crime brings a case within the Act.

It is true that in such a case as the one under discussion the offense need not be proved to have been committed on the exact dates named in the indictment. The inquiry should be, therefore, whether the alleged fugitive was in the state at the actual time of the crime. But to presume in the absence of evidence that the indictment does not state the correct date, and that the crime was in fact committed on the different date when the alleged fugitive was in the state, would seem clearly unwarrantable. No evidence of this nature having been offered in the case in hand, it was proper to confine the inquiry to the dates stated.

THE DEFENSE OF CONTRIBUTORY NEGLIGENCE. — In the American Lawyer for January Mr. Paul Speake in an article entitled *Wantonness in Personal Injury Cases* discusses "wantonness" as defined and applied by the Alabama Courts. 12 Am. Lawyer 4. The difficulty of stating any concise definition of the term is clearly pointed out, and many cases in which the defendant has, or has not, been held guilty of wantonness are cited. The term "wantonness" characterizes that conduct of the defendant which enables the plaintiff to recover notwithstanding his contributory negligence even though the injury suffered by the plaintiff was not intended by the defendant. Mr. Speake limits his discussion to the state of the law in Alabama, but the article gives rise to the general question: What is the nature of the defense of contributory negligence, and to what class of cases ought it to apply? There is no such defense in cases where the defendant has intentionally damaged the plaintiff. *Steinmetz* v. *Kelly*, 72 Ind. 442. Here the defendant is held liable for the plaintiff's damage, even though the plaintiff's negligence aided the defendant to accomplish the injury he desired. The defense of contributory negligence is applicable to actions based on the defendant's negligence in cases where the plaintiff's negligence is wholly or partly the legal cause of the damage for which he is seeking to recover. The defense ought not to be said to apply to those cases where the plaintiff's own negligence intervenes and breaks the causal connection between defendant's breach of duty and the plaintiff's injury. The real defense in these cases is that the defendant's negligence is not the legal cause of the damage. However the term "contributory negligence" is frequently applied to these cases. POLLOCK, TORTS, 446, 447.

The real case of contributory negligence is one in which the plaintiff's injury is caused both by the negligence of the defendant and of the plaintiff, the negligence of neither breaking the causal connection between that of the other and the resulting damage. In such a case the plaintiff cannot recover, not because it can be said that the defendant's negligence is not the immediate cause of the injury, but because the plaintiff could have avoided the injury by the exercise of due care. In order to recover damages the plaintiff must show that at the time of the injury "by ordinary care he could not, and the defendant could, have prevented the injury." Carpenter, J., in *Nashua, etc., Co.* v. *Worcester, etc., R. R. Co.*, 62 N. H. 159. "The justification of the rule is in reasons of policy, viz., the desire to prevent accidents by inducing each member of the community to act up to the standard of care set by law." 3 HARV. L. REV. 270. If the breach of duty causing the damage for which the plaintiff seeks to recover is committed by the defendant with a consciousness that damage is likely to result, then, according to some definitions, the tort is not a negligent one. WHART. NEG. § 3. But according to others the tort is called negligent. SAUND. NEG., 1st ed., 1. The books and reports are hopelessly in conflict and not much is to be gained by a consideration of them. It is believed, however, that the defendant should not be denied the defense of contributory negligence unless he has actual knowledge of the danger to which he is unlawfully subjecting the plaintiff, and, having such knowledge and being indifferent as to the consequences, omits to use reasonable means to prevent the injury. It is not enough that the defendant ought to know of the damage. This view finds support in some of the decisions. *Ga. Pacific R. R. Co.* v. *Lee*, 92 Ala. 262.

The position of the defendant should be the moral equivalent of that of a wilful wrongdoer if the rule of policy denying relief to a negligent plaintiff is to become non-effective.

Effect upon Foreclosure Sale of the Death of Mortgagor before Confirmation. A common statute provides that upon default of payment by the mortgagor, the mortgagee may file a petition or commence *scire facias* proceedings for foreclosing the equity of redemption. By the decree or judgment thereunder a new date is fixed on or before which the mortgagor may redeem, and at which, if the mortgagor has not redeemed, the realty will be sold by an officer of the court and the proceeds applied to the payment of the debt. In some states, where foreclosure is accomplished by the sale under *scire facias* proceedings, no confirmation is required. More commonly, however, confirmation is necessary. In case the mortgagor dies during these proceedings, the validity of the foreclosure has been recently questioned. *Effect upon a Foreclosure Sale of the Death of the Mortgagor before Confirmation*, by Edward M. Winston, 58 Central L. J. 103 (Feb. 5, 1904). Until the confirmation of the sale, it is contended, the mortgagor's interest continues. Since an estate will accordingly pass to the heir on the death of the mortgagor, Mr. Winston concludes that the foreclosure is invalid, unless the heir is made a party to the proceedings. The fact that a contrary rule has been generally adopted and the reason for its adoption are ignored by Mr. Winston.

The essential nature of foreclosure proceedings requires that the holder of the equity of redemption be a party to the decree. If before the decree is rendered, therefore, the mortgagor dies and proceedings are not revived against the heir, the decree and any sale thereunder are plainly void. *Hunt* v. *Acre*, 28 Ala. 580. If, however, the mortgagor dies after the decree is rendered, it has been held that reviver against his successor is not necessary to the validity of subsequent proceedings. *Hays* v. *Thomae*, 56 N. Y. 521; *Trenholm* v. *Wilson*, 13 S. C. 174. Support for this view is sought in the rule that a decree obtained in the lifetime of the defendant-party may be enrolled after his death. See *Harrison* v. *Simons*, 3 Edw. (N. Y.) 394, 395. This analogy between enrollment and the confirmation of a foreclosure sale, it is submitted, is fallacious. Enrollment is a non-discretionary and ministerial act. *Sheffield* v. *Duchess of Buckingham*, West 673. The confirmation of the foreclosure sale by the court, on the other hand, is the definitive act in the foreclosure proceedings. The foreclosure sale passes no title to the purchaser. *Woehler* v. *Endter*, 46 Wis. 301. Only upon the confirmation of the sale, which rests entirely within the discretion of the court, does title pass to the purchaser. *Brown* v. *Isbell*, 11 Ala. 1009. When the equity of redemption is finally foreclosed, the holder, it would seem, should be before the court. One jurisdiction has already held that, upon the death of the mortgagor before the foreclosure sale, reviver is necessary against his successor. *Glenn* v. *Clapp*, 11 G. & J. (Md.) 1. Upon principle it seems sound, as Mr. Winston contends, to make reviver of proceedings against the successor essential to the validity of the foreclosure, when the mortgagor dies at any time before the confirmation.

Malicious Torts. — The attempt is made in a suggestive and noteworthy article of recent date, remarkable for its keen analysis and its accuracy of expression, to separate and distinguish the different kinds of questions that may arise in a case of malicious tort. *Malicious Torts*, by Henry T. Terry, 20 L. Quart. Rev. 10 (Jan., 1904). The author begins with an elaborately wrought discrimination between the various kinds of rights and duties recognized in the law. To each legal right corresponds a particular kind of legal duty. When a breach of the corresponding duty results proximately in a violation of a right, a

tort action arises. To the more tangible and definite rights, which the author styles "distinct," including, for example, rights of person and property, correspond duties peremptory in character, or "duties of reasonableness" or "duties of mere intention." But to the vaguer right which Mr. Terry terms the "right of pecuniary condition" — which seems to be "the holding of value or purchasing power," and which is distinguished from property in that it need not be a right in specific things at all, — to this right the only corresponding duty is to abstain from malicious acts. That there is such a duty he thinks perfectly clear. But to this duty there are exceptions so numerous as to destroy the rule in most cases where the act cannot be considered wrongful in some collateral aspect. Thus, the rule does not apply to acts done in the exercise of "distinct" rights, or in the enforcement of a contract, or of a right of action. And the questions raised by such cases as *Allen* v. *Flood*, — whether there is a duty not to maliciously persuade a person to break his contract with the plaintiff, or to refuse to enter into relations with him, and whether a duty is broken when such acts are done by a combination, if not when done by a single individual — are questions in each case of admitting exceptions to the general rule; and they depend on considerations of justice and policy, not on any theory of malice. The first question to be asked in such a case is whether any right has been violated; and if so, whether it is not a right to which a duty involving no more than mere intention corresponds. If the first of these questions is answered in the negative, or the second in the affirmative, obviously any discussion of malice is irrelevant and confusing.

It may be doubted whether Mr. Terry has entirely cleared up the confusion in the law on this subject, of which he complains However sound his analysis, it is not simple. There is ample room, it would seem, for further confusion in drawing the line he suggests between "distinct" and "vague" rights; and, after all is said, he finds the test to be that which has consistently been applied, justice and policy.

ACTS OF CONGRESS DECLARED UNCONSTITUTIONAL BY THE SUPREME COURT. *Blackburn Esterline.* 38 Am. L. Rev. 21.

BLOCKADE AND CONTRABAND. *Charles L. Nordon.* 29 Law Mag. & Rev. 179.

CIRCUMSTANTIAL OR PRESUMPTIVE EVIDENCE. *N. W. Sibley and W. Madden.* 26 Law Stud. J. 31.

COURT OF LAND REGISTRATION. *Charles Thorton Davis.* 13 Yale L. J. 182.

COVENANTS FOR QUIET ENJOYMENT IN A LEASE. *Charles Thwaites.* 26 Law Stud. J. 30.

DOCTRINE OF RES GESTÆ IN THE LAW OF EVIDENCE. *N. W. Sibley.* 20 L. Quart. Rev. 85.

EFFECT UPON A FORECLOSURE SALE OF THE DEATH OF THE MORTGAGOR BEFORE CONFIRMATION. *Edward M. Winston.* 58 Central L. J. 103. See *supra.*

FORFEITURE OF LIFE INSURANCE FOR NON-PAYMENT OF PREMIUM. *Charles W. Tillett.* 1 North Carolina J. of L. 67.

FREEHOLD ESTATES. *P. S. Hannagan.* 19 Chic. L. J. 767.

INCOMPETENCY TO CONTRACT AND ITS EFFECTS ACCORDING TO THE LAW OF BRITISH INDIA. *H. H. Shephard.* 20 L. Quart. Rev. 81.

IS THE SURROGATE COURT FULFILLING ITS PURPOSE? *Louis W. Marcus.* 66 Albany L. J. 40.

JAMES WILSON AS A JURIST. *James Oscar Pierce.* 38 Am. L. Rev. 44.

JUDICIAL HISTORY OF INDIVIDUAL LIBERTY. *Van Vechten Veeder.* 16 Green Bag 101.

JURISDICTION OVER FOREIGN SHIPS IN TERRITORIAL WATERS. *Charles Noble Gregory.* 2 Mich. L. Rev. 333.

LAW REPORTING: A REPORTER'S VIEW. *Frank Evans.* 29 Law Mag. & Rev. 88.

LEGAL EDUCATION IN GERMANY. *Gustav Schirrmeister.* 29 Law Mag. & Rev. 129.

LIABILITY OF CITY FOR FIRE CAUSED BY FAILURE TO ENFORCE ORDINANCE. *Anon.* 10 Case & Com. 97.

LIABILITY OF GOVERNOR, MAYOR, OR OTHER EXECUTIVE OFFICIAL FOR THE NEGLIGENCE OF HIS APPOINTEES. *Anon.* 58 Central L. J. 101.

LIABILITY OF SERVANTS TO THIRD PERSONS FOR NEGLIGENCE. *Anon.* 10 Case & Com. 98.

LIFE INSURANCE — EFFECT OF INCONTESTABLE CLAUSE IN CASE OF SUICIDE. *Anon.* 58 Central L. J. 128.

MALICIOUS TORTS. *Henry T. Terry.* 20 L. Quart. Rev. 10. See *supra.*

NEED OF A NATIONAL INCORPORATION LAW. *H. L. Wilgus.* 2 Mich. L. Rev. 358.

NEGLIGENCE OF RAILWAY COMPANIES IN CANADA. *C. H. Masters.* 40 Can. L. J. 60.

NEGOTIABLE INSTRUMENTS LAW. *John Lawrence Farrel.* 5 Brief 1.

NEWSPAPERS AND LABOUR. *Frank S. Hodgins.* Discussing *interim* injunctions against publishing notices of strikes containing warnings to labourers to keep away. 24 Can. L. T. 40.

NEW YORK ANTI-TRUST ACT. *Thaddeus D. Kenneson.* Arguing that the only effect of the Act is to make illegal those contracts which before were unenforceable on grounds of public policy. 4 Columbia L. Rev. 83.

NEW YORK CODE OF EVIDENCE. Part II. *David Dudley Field and William Rumsey.* A proposed but unadopted code. 5 Brief 35.

ORIGIN AND HISTORY OF THE CHANCERY DIVISION. *Erasmus Darwin Parker.* 29 Law Mag. & Rev. 164.

PUBLIC RIGHTS IN THE SEASHORE. *Anon.* 58 Justice of P. 63.

RECENT WORKMEN'S COMPENSATION ACT. *Anon.* Summary of recent English decisions. 116 Law T. 261, 312.

RIGHT OF ACCUSED TO RESIST EXTRADITION BY PROVING ALIBI. *Anon.* 58 Central L. J. 121. See *supra.*

RIGHT OF THE SUBJECT TO PERSONAL LIBERTY IN ENGLISH LAW. *S. P. J. Merlin.* 29 Law Mag. & Rev. 194.

ROMAN-DUTCH LAW IN SOUTH AFRICA. *W. R. Bisschop.* 20 L. Quart. Rev. 41.

ROMAN LAW IN ENGLISH DECISIONS. *James Williams.* 29 Law Mag. & Rev. 139.

SCHEMES TO CONTROL THE MARKET. *Bruce Wyman.* 16 Green Bag 80.

SOME REMINISCENCES OF CRIMINAL LAW. *George S. Holmested.* 3 Can. L. Rev. 20.

STATUTORY REGULATION OF EMPLOYMENTS OF WOMEN. *Andrew Bruce.* 58 Central L. J. 123.

STOCK EXCHANGE "DIFFERENCES" AND THE GAMING LAWS. *W. Strachan.* 20 L. Quart. Rev. 53.

TACKING AS AGAINST A SURETY. *Anon.* 38 Irish L. T. 65.

THE ADVOCATE. *N. H. Loomis.* Discussing the art of presenting cases to the jury. 5 Brief 19.

THE BREAKDOWN OF THE LAND TRANSFER ACTS SYSTEM IN ENGLAND. *J. L. Hogg.* 20 L. Quart. Rev. 74.

THE NATURE OF JURISPRUDENCE AND OF THE LAW. A STUDY IN APPLIED LOGIC. *George H. Smith.* 38 Am. L. Rev. 68.

THE NEXT STEP IN THE EVOLUTION OF PUNISHMENT. *Whitehead Kluttz.* 1 North Carolina J. of L. 56.

THEORY AND THE LAW OF WATER WORKS SECURITIES. *Ambrose Tighe.* 13 Yale L. J. 165.

THEORY OF EVIDENCE. *Henry T. Terry.* 13 Yale L. J. 190.

TRADE REGULATIONS IN THE MIDDLE AGES. *Percy Houghton Brown.* 29 Law Mag. & Rev. 148.

TREASURE TROVE AND THE BRITISH MUSEUM. *William Martin.* 20 L. Quart. Rev. 27.

WANTONNESS IN PERSONAL INJURY CASES. *Paul Speake.* 12 Am. Lawyer 4. See *supra.*

WHAT IS THE COMMON LAW? *John S. Ewart.* Discussing the existence of the Law Merchant as apart from the Common Law. 4 Columbia L. Rev. 96.

II. BOOK REVIEWS.

COMMENTARIES ON THE LAW OF TORTS. A philosophic discussion of the general principles underlying civil wrongs *ex delicto*. In two volumes. By Edgar B. Kinkead. San Francisco: Bancroft-Whitney Company. 1903. pp. xxxi, 1–851; xv, 852–1739. 8vo.

The general conception of this work is most ambitious. It purports to be a statement and general discussion, from a logical and philosophical point of view, of all the principles of law comprised within the scope of its subject. The main plan of the volumes is excellent. First the author discusses fundamental doctrines and considers the classification of those legal rights which form the basis of this branch of the law; then he approaches the subject from the side of the person doing the tortious act, his status or position, and his relation to the injured person; and finally the writer deals in a very comprehensive way with the specific wrongs which constitute the vast number of actionable torts.

The introductory discussion and that dealing with the subject of fundamental rights is rather inadequate. It lacks the clearness and conciseness so necessary to a successful exposition of subjects of this character. The treatment, however, of the law of torts from the point of view of the actor and his relation to the injured person is the most satisfactory portion of the work and is of real value. The principles determining and defining the various specific torts are for the most part clearly settled, but the application of those principles to the varied, complex relations of our modern life and the effect upon them of the situation or status of the actor, are even yet often matters of considerable doubt or difficulty. It is in this field, in the reviewer's experience, that the tort problems of our present day practice are most frequently arising. Therefore the writer very wisely emphasizes this phase of his topic, and his treatment of it will be found most helpful and practical.

The whole work is most comprehensive in its scope, and, in outline at least, considers almost every problem in any wise directly related to the law of torts It is, however, but a general summary, and though it presents an excellent general view of the whole subject, for the more detailed working out of any particular narrow question this book will be found to be but the starting-point. As this department has often been obliged to say before, the author has taken too large a subject to be able to do the most valuable work. If he had been content to devote himself solely to that portion of his topic dealing with the status and relations of persons, and had gone to the bottom of that subject, his real scholarship would have produced a work truly scientific and of much greater service. The book will, from its comprehensiveness, prove an excellent reference work, and its full citations of cases and other authorities will in a measure make up for the often rather meager discussion of the text. As in most recent publications, there is a long table of cases cited, but it seems at least doubtful whether this will be worth the labor expended in its compilation or the more than two hundred pages which it occupies. This time and space could, it would seem, have been more advantageously expended upon the index. That of this work, however, is of more than average excellence and renders the vast amount of material in the book quite readily accessible. W. H. H.

THE AMERICAN LAW OF LANDLORD AND TENANT. By John N. Taylor. Ninth Edition. Revised by Henry F. Buswell. In two volumes. Boston: Little, Brown & Company. 1904. pp. cxv, 541; xv, 592. 8vo.

When a legal text-book has warranted conservative publishers to issue nine editions it is some evidence that the book is of considerable merit and is so recognized by the profession. This holds particularly true of Taylor's Landlord and Tenant. Since 1844, when the first edition was put forth in one

volume containing only three hundred and ninety-eight pages of text, about nineteen hundred cited cases, and an appendix of forms covering fifty-five pages, Mr. Taylor's work has been considered authoritative on the American law of landlord and tenant. Between the years 1844 and 1873 six editions of the work appeared, edited by the author. In that period the number of pages had not quite doubled. The seventh edition, published in 1879 after the author's death, was the work of Mr. Joseph N. Willard, who had assisted the author in the preparation of previous editions. With the appearance of the eighth edition, which was by the present editor, Mr. Henry F. Buswell, the work was changed to two volumes of about five hundred pages each, including the forms. Seventeen years were allowed to pass before the appearance of the ninth edition. In that period many cases within the field covered by the book were decided, which made necessary a considerable revision and also some addition to the text. The work has been done with a careful hand. All the additions in the text and notes are put in brackets. The chief expansion has been made on the subjects of covenants between the lessor and the lessee; surrender; assignments; forfeiture; rights of mortgagors and mortgagees under leases; rights to fixtures as between landlord and tenant; mining leases; railroads and receivers as lessors and lessees; and equity jurisdiction as applied to the relation between landlord and tenant. About twelve hundred cases were added, which brings the total number of cases cited to approximately ten thousand or about five times the number cited in the first edition. The book now appears in two volumes aggregating nine hundred and sixty-eight pages of text and notes, and one hundred and six pages of forms.

A new edition of this work was very desirable at this time. The eighth edition was so old that it was no longer of as great present practical value as Judge McAdam's work on the same subject, the third edition of which appeared in 1900. Mr. Taylor's book does not cover so large a field as that of Judge McAdam; but being practically the same in size, — allowing for differences in typography and leaving out of account volume three of McAdam, which is devoted solely to summary proceedings under New York law, — it covers its portion of the field somewhat more fully. It contains roughly about two thousand more citations. There is an elaborate index of sixty pages. The arrangement, presswork, and binding are of a very high order.

THE ART OF CROSS-EXAMINATION. Together with the cross-examinations of important witnesses in some celebrated cases. By Francis L. Wellman. New York: The Macmillan Company. London: Macmillan & Co., Ltd. 1903. pp. 283. 8vo.

"It is experience, and one might almost say experience alone, that brings success in the art of advocacy." This is one of the sentences of Mr. Wellman's opening chapter. The truism, found in one form or another in nearly all treatises on the examination of witnesses, is a succinct statement of the reason why many of them are of little practical use. The results drawn by the authors from their own or others' experiences do not become the reader's by their mere presentation abstractly to him. He must see how the results were reached. Lacking experience of his own, he must have it at second hand. It is Mr. Wellman's realization of this need which gives value to his book. He is nothing if not concrete. Each general principle stated seems merely to form a hook on which to hang the particular experiences from which it was induced, as frequently the author's own as those which have come under his immediate observation in a long practice at the New York bar. These actual cross-examinations, so copiously quoted from, are modern, up-to-date, and doubly useful as the product of the kind of litigation that modern conditions give rise to. The chapter on the examination of experts is especially good. In fact Mr. Wellman has given us an excellent substitute for time spent with observant eye and ear in court rooms, with the added advantage that our material has been selected for

us, and we have an experienced mentor at our elbow telling us what to observe. Incidentally he has written a very interesting book, exasperating to a reviewer without space for quotations. The freshness of nearly all of his illustrations makes one tolerant of an occasional hoary friend, such as the anecdote of the plaintiff who, after with difficulty showing the jury the utmost height to which he had been able to raise his injured arm since an accident, shot it up to its full length in answer to a sudden query as to how far he could raise it before. This is doubtless a concession to the layman reader, who is very evidently in the author's mind throughout — naturally, since a book is made to sell. One wonders how much due to the same cause is the insertion of the chapter on "Some Famous Cross-Examiners and their Methods," and the last five chapters, each containing nothing but the report of cross-examinations in some famous modern trial. These last form interesting reading, but one misses the mentor at one's elbow, and wishes they had been made an integral part of the book instead of being merely appended.

JUDICIAL DICTIONARY of words and phrases judicially interpreted, to which have been added statutory definitions. By F. Stroud. In three volumes. Second Edition. London: Sweet and Maxwell, Ltd.; Stevens & Sons. Boston: The Boston Book Co. 1903. pp. ccxxvii, 1–592; 593–1394; 1395–2302. 8vo.

The claim of the author that this dictionary is unique cannot be questioned. Unlike other legal or judicial dictionaries, all terms which may appear to the lay mind to be legal terms are not defined in it; nor are those Latin phrases defined which are commonly used with peculiar legal significations. On the other hand, many words and phrases, the meaning of which the layman and even the lawyer would not ordinarily think of looking for in a legal dictionary, are very elaborately and carefully defined. The dictionary is more peculiarly a "dictionary of the English language (in its phrases as well as single words), so far as that language has received interpretation by the judges"; and it is also a dictionary of statutory definitions in Acts of Parliament.

Prefixed to the dictionary proper are lists of cases, covering one hundred and thirty pages; lists of English statutes and their sections with references to the pages of the dictionary, covering fifty pages; tables of abbreviations, covering twenty pages; and an introductory chapter on the construction of documents.

The statutory definitions and the words and phrases of statutes are taken wholly from English acts, and therefore are not of great use to American lawyers; but the collection of statutes whose terms are defined is very complete, and should prove of value to the lawyers of Great Britain, its colonies and dependencies, for whom the work is especially designed.

It should not be believed from what is said above that the work is without interest to American lawyers. In truth, it is of considerable value. All words which have been or are likely to become material in the construction of documents are very fully and carefully defined. This definition, moreover, is not a mere explanation of those words by other words, but is a statement of the effect given to the words in actual cases. Approximately seventeen thousand cases are cited for these definitions. It is clear from this that for the interpretation of words which are material in deeds and wills, the book should be of equal value to the English and to the American lawyer. The work shows great care and much scholarly research.

THE ELEMENTS OF THE FISCAL PROBLEM. By L. G. Chiozza Money. London: P. S. King & Son. 1903. pp. 237. 8vo.

With commendable impartiality the publishers of Mr. Ashley's book, "The Tariff Problem," have just issued from their press a book setting forth the views of the opposing camp. The purpose of the latter work apparently is to

offer answers to the arguments of those who advocate fiscal reform, and more particularly to analyze and refute the arguments and evidence offered by Mr. Ashley. The tone of the later book is not commendable. The author attempts to belittle the arguments of his opponents by ridicule. This fault is noted more in the earlier chapters, and appears less and less as the author gets deeper into his subject. The book is not so readable as Mr. Ashley's, partly because the author's style is not so good nor his exposition so lucid, and partly because statistical evidence is used even more freely than in Mr. Ashley's work.

Mr. Money, of course, had the advantage of seeing Mr. Ashley's book in print. At times he uses Mr. Ashley's figures, and shows that merely by changing the point of view the result obtained may be very different. The two books are admirable illustrations of what many persons have long felt, — that figures may be used to prove almost anything.

Apart from the intemperateness of its tone and peculiarities of style, the book is a very able exposition of the arguments against the adoption of a preferential tariff for England. Mr. Money believes that England's economic welfare is not seriously threatened by Germany ; and he further believes that it cannot be assured by cultivating trade with the colonies at the cost of paying more for the many things the colonies do not and cannot produce.

An analytic index at the close of the volume makes the statistical evidence easily available.

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by William Mack and Howard P. Nash. Vol. X. New York: The American Law Book Company. London: Butterworth & Co. 1904. pp. 1370. 4to.

The present volume embraces the topics of Corporations to Cost Price inclusive. All but seven pages are occupied by Mr. Seymour D. Thompson's article on "Corporations." In number of pages this article is larger than any previous encyclopedic treatment of the law of corporations, and with the article by the same author on "Foreign Corporations," which is promised for a succeeding volume, it will exceed the length of most treatises on corporations. The purpose of the present work requires that the law be stated in a form easily accessible for reference. The logical analysis of the subject into its great divisions and the orderly elaboration of each division are more important than mere exhaustiveness in the accumulation of cases. In the present article Mr. Thompson has shown the same industry in collecting the authorities that distinguished his "Commentaries on the Law of Private Corporations"; in this respect the chapter on "Ultra Vires" is especially notable. His arrangement of material, however, is less happy. The definition of Corporate Franchise, for example, is postponed for a thousand pages, and is finally discussed after Consolidation or Amalgamation of Corporations, Rights and Remedies of Shareholders, and Ratification by Corporations. The tabular digest which accompanies the article does not entirely relieve this difficulty. The chapter entitled "Consolidation or Amalgamation of Corporations," contains no subhead relating to Corporate Stockholding and Control. Notwithstanding these occasional eccentricities of arrangement, the article has real importance as the mature expression of one who already has considerably moulded legal opinion upon this subject.

A TEXT-BOOK OF LEGAL MEDICINE AND TOXICOLOGY. Edited by Frederick Peterson and Walter S. Haines. Vol. II. Philadelphia, New York and London: W. B. Saunders & Company. 1904. pp. 825. 8vo.

This volume is divided into two parts. The first part treats of malingering and feigned disorders, the legal aspects of pregnancy, legitimacy, abortion, rape, marriage and divorce, malpractice, laws relating to the insane, etc. The second part has to do with the different kinds of poisons, ptomaines and other bacterial products in their relation to toxicology, medical examinations of blood and

blood-stains, etc. An examination of the work will show that this is not a complete list of the topics treated. From the topics here given, however, one sees that the book deals with those medical questions which frequently occur in the courts. The contributors have shown great skill in leaving out of their discussion the great mass of collateral matter usually given in the text-books dealing with the particular subjects treated, and have given to the lawyer the means of quickly finding what are the essential facts and phenomena relating to the case in hand. The work is accurate and includes the results of the latest investigations on the topics treated. This conciseness and accuracy together with the fact that material has been selected with the view of satisfying the needs of the lawyer, makes the book of peculiar value to the legal profession.

IMPERATORIS IUSTINIANI INSTITUTIONUM, LIBRI QUATTUOR, with Introduction, Commentary, and Excursus. By J. B. Moyle. Fourth Edition. Oxford: The Clarendon Press. London: Stevens & Sons, Ltd. 1903. pp. vii, 680. 8vo.

SIXTEENTH REPORT ON THE CUSTODY AND CONDITION OF PUBLIC RECORDS OF PARISHES, TOWNS, AND COUNTIES. By Robert T. Swan, Commissioner. Boston: Wright & Potter Printing Co. 1904. pp. 23. 8vo.

THE PRINCIPLES OF THE ADMINISTRATIVE LAW, governing the relations of public officers. By Bruce Wyman. St. Paul: Keefe-Davidson Company. 1903. pp. x, 641. 8vo.

STREET RAILWAY REPORTS. Vol. 1. Reporting electric and street railway decisions of the Federal and State Courts. Edited by Frank B. Gilbert. Albany, N. Y.: Matthew Bender. 1904. pp. xvi, 943. 8vo.

THE TRUSTS AND THE CONSTITUTION. A monograph, by Hugo Clark and Bartlett Brooks. Bangor, Me.: The Thomas W. Burr Printing Co. 1904. pp. 34. 8vo.

REPORT OF THE OHIO STATE BOARD OF UNIFORM LAWS. 1903.

HARVARD
LAW REVIEW.

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THE HISTORY OF THE HEARSAY RULE.

UNDER the name of the Hearsay Rule will here be understood that rule which prohibits the use of a person's assertion, as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it. The history of the Hearsay Rule, as a distinct and living idea, begins only in the 1500's, and it does not gain a complete development and final precision until the early 1700's. Before tracing its history, however, from the time of what may be considered its legal birth, it will be necessary to examine a few salient features of the preceding century, in order to understand the conditions amid which it took its origin.

One distinction, though, must be noticed even before this preliminary survey, — the distinction between requiring an extra-judicial speaker to be called to the stand to testify, and requiring one who *is already on the stand* to speak only of his personal knowledge. The latter requirement had long ago been known in the early modes of trial preceding the jury. In the days when proof by compurgation of oath-helpers lived as a separate mode alongside of proof by deed-witnesses and other transaction-witnesses, "the witness was markedly discriminated from the oath-helper; the mark of the witness is knowledge, acquaintance with the fact in issue, and, moreover, knowledge resting on his own

observation."[1] Such a witness' distinctive function was to speak *de visu suo et auditu*.[2] The principle was not fully carried out; for a deed-witness need not have actually seen it executed, and might merely have promised by attestation to appear and vouch in court.[3] But at any rate this principle, so far as it prevailed, concerned a different mode of trial, "trial by witnesses," which jury-trial supplanted.[4] Afterwards, nearly three centuries later, when jury-trial itself had changed, and witnesses (now in the modern sense) became once more a chief source of proof, the old idea reappeared and was prescribed for them; the witness would speak to "what hath fallen under his senses,"[5] and this became in the modern law a fundamental principle. But at the time now to be considered, when jury-trial was coming in (say the 1300's), that principle belonged in what was practically another mode of trial, and did not affect the development.

What we are here concerned with is a different notion, namely, that when a specific person, not as yet in court, is reported to have made assertions about a fact, that person *must be called to the stand*, or his assertion will not be taken as evidence. That is to say: suppose that A, who does not profess to know anything about a robbery, is offered to prove that B, who did profess to know, has asserted the circumstances of the robbery; here B's assertion is not to be credited or received as testimony, however much he may know, unless B is called and deposes on the stand. As to the history of this simple but fundamental notion, — the Hearsay Rule proper, — it is necessary at the outset to notice briefly certain important conditions which prevailed at the beginning of the 1500's.

(*a*) And, first, it is clear that there was, up to about that time, no appreciation at all of the necessity of calling a person to the stand as a witness in order to utilize his knowledge for the jury.

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[1] 1892, Brunner, Deutsche Rechtsgeschichte, II. 397.

1902, Schröder, Lehrbuch der deutschen Rechtsgeschichte, 4th ed., 772.

[2] 1898, Thayer, Preliminary Treatise on Evidence, 18, 499.

[3] Thayer, *ubi supra*, 98. A good additional illustration occurs in Seld. Soc., Select Civ. Pl., I. No. 76; and as late as 1543, in Rolfe *v.* Hampden, Dyer 53 *b*, a survival of this is seen in the case of two will-witnesses who "deposed upon the report of others." This was probably because such witnesses were originally transaction-witnesses, not document-witnesses, and in their latter character the earlier trait survived, as the history of the parol-evidence rule indicates.

[4] Thayer, *ubi supra*, 17, 500; Brunner, Entstehung der Schwurgerichte, quoted *infra*.

[5] 1670, Vaughan, C. J., in Bushel's Trial, 6 How. St. Tr. 999, 1003; 1696, Holt, C. J., in Charnock's Trial, 12 id. 1454.

On the contrary, the leading conditions and influences of jury-trial permitted and condoned the practice of the jury's obtaining information by consulting informed persons not called into court:

1872, Professor *Heinrich Brunner*, The Origin of Jury Courts, 427, 452: "We may not interpret the verdict '*ex scientia*,' in the domain of English law, as a verdict based on personal perception. The jurors of the assize were certainly entitled to give a verdict based on the communications of trustworthy neighbors. Glanvill makes it requisite, for the jurors' knowledge, 'that they should have knowledge from their own view and hearing of the matter or through the words of their fathers and through such words of persons whom they are bound to trust as worthy.' Thus they exhibit really in their verdict the prevailing conviction of the community upon the matter in question. For ascertaining this, ample opportunity is furnished by the 'view' and by the period of time elapsing between the view and the swearing in court. If their verdict agreed with the opinion throughout the community, they had nothing to fear from an attaint. . . . Thus the juror of the English law who gives a verdict *ex scientia* (with reference to the view of lands had) is a 'knowledge-witness' simply, whether his knowledge rests on his own perceptions or on another's communication. . . . The English knowledge-witness [juror] is not an eye-witness, not a *testis de scientia* in the sense of the later Norman law."[1]

1895, Sir *F. Pollock* and Professor *F. W. Maitland*, History of the English Law, II. 622, 625: "Some of the verdicts that are given must be founded on hearsay and floating tradition. Indeed, it is the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court. They must collect testimony. . . . At the least a fortnight had been given to them in which to 'certify themselves' of the facts. We know of no rule of law which prevented them from listening during this interval to the tale of the litigants. . . . Separatively or collectively, in court or out of court, they have listened to somebody's story and believed it."

The ordinary witness, as we to-day conceive him, coming into court and publicly informing the jury, was (it must be remem-

[1] Professor Brunner goes on to point out (p. 453 ff.) that since in France the judicial use of "trial by witnesses" proper came early into prominence (in the 1300's and 1400's) through the civil or canonical system, and since the contrast between these two competing methods led the former to be called *testes de scientia* and the jurors merely *testes de credentia*, the jury system became discredited as an inferior one and ultimately fell into disuse. In other words, the lack of any sharp discrimination in England as to the sources of the jury's "knowledge" was the marked feature which enabled it to survive, in contrast to the fate of its kindred institution in Normandy, where circumstances had led to the emphasizing of its inferior sources of knowledge. Compare also Glasson, Hist. du droit et des inst. de la France, VI. 544.

bered) in the 1400's a rare figure, just beginning to be known.[1] Of persons thus called, the chief kinds were the preappointed ones, — deed-witnesses and other transaction-witnesses; and even these, with the jury, "all went out and conferred privately as if composing one body; the witnesses did not regularly testify in open court."[2] Even where facts were involved which, as we should think, needed other testimony, the counsel stated them by allegation, and a special witness might or might not be present to sustain the allegations.[3] Well into the 1400's "it was regarded as the right of the parties to 'inform' the jury after they were empanelled and before the trial."[4] In 1450 it is said by Chief Justice Fortescue, "If the jurors come to a man where he lives, in the country, to have knowledge of the truth of the matter, and he informs them, it is justifiable,"[5] *i. e.* it is not the offense of maintenance.[6] Note that the only objection thought of is that of maintenance. In 1499 a juror, in a certain trial where a thunderstorm had caused a separation without leave, talked with a friend of one of the parties, and this, from the same point of view, was held not unlawful.[7] Such practices of obtaining information from informed persons not called were a chief reliance for the early jury. In fact, the strict notions then prevailing as to the offense of maintenance tended to discourage the coming of witnesses. In the 1400's "it was by no means freely done";[8] and when, in 1562–3,[9] compulsory process for ordinary witnesses was first provided, the measure came rather as a protection for the witness against the charge of maintenance than for any other reason. In short, as late as through the 1400's, there was not only no feeling of necessity for having every informant come to testify publicly in court,

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[1] Note 4, *infra*.

[2] Thayer, *ubi supra*, 97, 102; this continued probably into the 1500's.

[3] Thayer, *ubi supra*, 121, 133.

[4] Thayer, *ubi supra*, 92; in Palgrave's "The Merchant and the Friar," there cited, an account of a trial for robbery in London in 1303 represents the sheriff as saying, when asked by the judge whether the jury is ready: "The least informed of them has taken great pains to go up and down in every hole and corner of Westminster — they and their wives — and to learn all they could concerning his past and present life and conversation."

[5] Y. B. 28 H. VI. 6, 1; cit. Thayer, 128; see also the petition quoted ib. 125.

[6] Again, in 1504 (Y. B. 20 H. VII. 11, 21; cit. Thayer, 129), Rede, J., says: "If the jury come to my house to be informed of the truth, and I inform them, that is not maintenance."

[7] Y. B. 14 H. VII. 29, 4; cit. Thayer, 132.

[8] Thayer, *ubi supra*, 130.

[9] St. 5 Eliz. c. 9, § 6.

but there was still a discouragement of such a general process; and the jury might and did get a great deal of its knowledge by express inquiry from specific persons not called or by the counsel's report of what had been or would be said by persons not called or not put on the stand.

(*b*) But in the meantime certain conditions were changing in a significant respect. Contrasting the end of the 1400's and the beginning of the 1600's, it appears, as the marked feature, that the proportion between the quantity of information obtained from ordinary witnesses produced in court and of information by the jury itself contributed or obtained was in effect reversed. The former element, in the 1400's, was "but little considered and of small importance";[1] but by the early 1600's the jury's function as judges of fact, who depended largely on other persons' testimony presented to them in court, had become a prominent one, perhaps a chief one.[2] It is necessary to appreciate that the ordinary witness (as we conceive him) did not come to be a common feature of jury trials till the very end of the 1400's.[3] Thus during the 1500's the community was for the first time dealing with a situation in which the jury depended largely, habitually, and increasingly, for their sources of information, upon testimonies offered to them in court at the trial.

(*c*) This, then, is the reason why another notion (a marked feature of the 1500's and early 1600's) should come into particular prominence at that epoch and not before. During that period much is found to be said, in the trials, about the number of witnesses, their sufficiency in quantity and quality. Juries were just beginning to depend for their verdict upon what was laid before them at the trial, and it was thus natural enough that they should begin to ask themselves, and to be urged by counsel to consider, whether they had been furnished with sufficient material for a right decision. Much begins to be thought and said, in statutes

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[1] Thayer, *ubi supra*, 130.

[2] For example, in 1499, Vavasour, J., says: "Suppose no evidence is given on either side, and the parties do not wish to give any, yet the jury shall give their verdict for one side or the other; and so the evidence is not material to help or harm the matter" (Y. B. 14 H. VII. 29, 4, cit. Thayer, 133); while in the early 1600's, Coke says (3 Inst. 163) that "most commonly juries are led by deposition of witnesses." Another indication is seen in the practical disuse of the attaint by the end of the 1500's (Thayer, *ubi supra*, 138, 150, 153, 167), due largely to the fact that the jury now depended so much upon testimony in court.

[3] Thayer, *ubi supra*, 102, 121, 122, 126.

and otherwise, about having witnesses "good and lawful," "good and pregnant," "good and sufficient."[1] There was, moreover, already in existence at that time, well known to a large proportion of the legal profession, and only waiting for a chance to be imported and adopted, a mass of rules in the civil and canon law about the number of witnesses necessary in given cases, and the circumstances sufficient to complement and corroborate testimony deficient in number. Throughout the state trials of the 1500's and early 1600's, the accused is found insisting that one witness to each material fact is not enough.[2] In spite of these repeated appeals to the numerical system of the civil law, they produced no permanent impression in the shape of specific rules, except in treason and perjury.[3] But the general notion thoroughly permeated the times, and barely escaped being incorporated in the jury system. In a particular respect it left an impression material to the present inquiry. There had hitherto been no prejudice against the jury's utilizing information from persons not produced. But now that their verdict depended so much on what was laid before them at the trial, and now that the sufficiency of this evidence, in quantity and quality, began to be canvassed, it came to be asked whether a hearsay thus laid before them would suffice. It was asked, for example, whether, if there was one witness testifying in court from personal knowledge and another's hearsay statement offered, the two together would suffice.[4] Again, it was

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[1] In other respects, also, this was a time significant of a desire to see to the sufficiency of the evidence placed before a jury; see Thayer, *ubi supra*, 179, 180, 430.

[2] A single example must suffice; in Lord Strafford's Trial (1640), 3 How. St. Tr. 1427, 1445, 1450, he argues: "He is but one witness, and in law can prove nothing"; such "therefore could not make faith in matter of debt, much less in matter of life and death."

[3] The treason-statutes, coming in 1547–1554, will be noted later. The history of the numerical system, and of its failure to obtain a foothold in our law, is examined in detail in an article entitled "Required Numbers of Witnesses; A Brief History of the Numerical System in England," 15 HARV. L. REV. 83.

[4] 1541, Rolfe *v.* Hampden, Dyer 53 *b* (of three witnesses to a will, "two deposed upon the report of others, and the third deposed of his own knowledge," and there was no apparent objection, though "the jury paid little regard to the testimony aforesaid").

1622, Adams *v.* Canon, Dyer 53 *b*, note (disbursement of money for P.; of two witnesses, one "deposed that he himself knew it to be true, and being examined why he would swear that, answered, 'because his father had said so'; and in this case much was said about the deposition of witnesses; first, that if one witness depose of his own knowledge of the very point in question, and the other in the circumstances, that shall be sufficient ground for the judge to pass sentence"; here the "circumstances" means the hearsay statement, as shown by Pyke *v.* Crouch, *infra*.)

discussed in Queen Mary's reign (1553), whether, of the two accusers required in treason, one could testify by reporting a hearsay.[1] In Raleigh's trial (1603), Chief Justice Popham, refusing to produce Cobham to testify, explained that, "where no circumstances do concur to make a matter probable, then an accuser may be heard [in court, and not merely by extra-judicial statement]; but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced"; [2] that is, a hearsay statement was sufficient if otherwise corroborated. So, too, the notion that persisted in the 1600's, that a hearsay statement, though not alone sufficient, was nevertheless usable in confirmation of other testimony,[3] was a direct survival of this treatment of hearsay from the standpoint of numerical sufficiency. During the 1500's nothing was settled in this direction; the matter was being debated and doubted. But the important feature is that the doubt about using hearsay statements — *i. e.* testimony from persons not called — was merely incidental to a general canvassing of the numerical and qualitative sufficiency of testimony, which in turn was a novelty arising from the jury-conditions of the 1500's.

It appears, then, that at the entrance to the 1500's (*a*) there had hitherto been no conception of a special necessity for calling to the stand persons to whose assertions credit was to be given; (*b*) that by the 1500's the increasing dependence of the jury on the evidence laid before them in court (as distinguished from their other sources of information) gave a new importance to such evidential material; and (*c*) that there was thus much debate as to the sufficiency of witnesses in number and kind, and that incidentally doubt began to be thrown on the propriety of depending on extra-judicial assertions, either alone or as confirming other testimony given in court.

With this preliminary survey, the process may now be traced of

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[1] 1553, R. *v.* Thomas, Dyer 99 *b* ("It was there holden for law, that of two accusors, if one be an accusor of his own knowledge, or of his own hearing, and he relate it to another, the other may well be an accusor").

1556, Dyer 134 *a*, note (under the treason statute requiring two accusers, "an accusation under the hands of the accusers or testified by others is sufficient").

1628, Coke, 3d Inst. 25 ("The strange conceit in 2 Mar. [Thomas's Case], that one may be an accuser by hearsay, was utterly denied by the justices in Lord Lumley's Case [1572]," "reported by the lord Dier under his own hand, which we have seen, but [is] left out of the print"); approved by Hale, Pleas of the Crown (1680), I. 306, II. 287.

[2] As reported in Jardine's Criminal Trials, I. 427.

[3] *Post*, p. 447.

making more precise and comprehensive the general notion against hearsay which thus sprang into consciousness. It will be convenient to consider, first, hearsay statements in general, and, next, hearsay statements under oath; for the rule as it affected the latter had both an earlier origin and a slower development.

I. *Hearsay statements in general.* (1) In the first place, then, there is no exclusion of hearsay statements. Through the 1500's and down beyond the middle of the 1600's, hearsay statements are constantly received, even against opposition. They are often objected to by accused persons, and are sometimes said by the judge to be of no value or to be insufficient of themselves, and are even occasionally excluded. In short, they are regarded as more or less questionable, and the doubt particularly increases in the 1600's; but, in spite of all, they are admissible and admitted. Nor is this result due to any abuse or irregularity peculiar to trials for treason or other State prosecutions; it is equally apparent in the rulings in the few civil cases that are reported. The practice is unmistakable.[1]

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[1] 1571, Duke of Norfolk's Trial, 1 How. St. Tr. 958, Jardine's Crim. Trials, I. 157, 158, 159, 179, 201, 206, 210 (various letters and other hearsay statements are used against the accused).

1590, Stranham *v.* Cullington, Cro. Eliz. 228 (prohibition for suing for tithes; "they said that hearsay shall be allowed for a proof").

1601, Webb *v.* Petts, Noy 44 ("the witnesses said that for a long time, as they had heard say, the occupiers . . . had used to pay annually to the parson 3s."; held that "a proof by hearsay was good enough to maintain the surmise within the statute 2 Ed. 6").

1622, Adams *v.* Canon, Dyer 53 *b*, note (a hearsay admissible for one witness; see quotation *supra*).

1632, Sherfield's Trial, 3 How. St. Tr. 519, 536 (information in the Star Chamber against a vestryman of New Sarum for breaking a painted glass window; to show that the Bishop had warned him not to do it, one of the Court offered a letter from the Bishop, "but this being out of course, and a thing to which the defendant could make no answer, was not approved of").

1640, Earl of Strafford's Trial, ib. 1381, 1427 ("they prove very little but what they took upon hearsays").

1644, Archbishop Laud's Trial, 4 id. 315, 383 (argued for defendant: "He adds what Sir Thomas Ailsbury's man said. . . . But why doth he rest upon a hearsay of Sir Thomas Ailsbury's man? Why was not this man examined to make out the proof?"), 391 (argued for defendant: "Of all which there is no proof but a bare relation what Mr. H., Mr. I., and Sir W. B. said; which is all hearsay and makes no evidence, unless they were present to witness what was said [by me to them]"); 395 (argued for defendant: "This is but Sir E. P.'s report, and so no proof, unless he were produced to justify it"); again at 399, 402, 432, 534, 538 (in all these instances the hearsay statements are received).

1663, Moders' Trial, 6 id. 273, 276 (bigamy; a witness testified that he once saw the

(2) In the meantime, the appreciation of the impropriety of using hearsay statements by persons not called is growing steadily. By the second decade after the Restoration,[1] this notion receives a fairly constant enforcement, both in civil and in criminal cases. There are occasional lapses;[2] but it is clear that by general acceptance the rule of exclusion had now become a part of the law as well as of the practice. There even is found[3] a counsel for the prosecution stopping "for example's sake" its violation by his own witness. No precise date or ruling stands out as decisive; but it seems to be between 1675 and 1690 that the fixing of the doctrine takes place.[4]

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first husband, not produced, "and the man did acknowledge himself to be so"; the Court: "Hearsays must condemn no man; what do you know of your own knowledge?" but the statement gets in).

1669, Hawkins' Trial, 3 How. St. Tr. 921, 935 (collateral charge that defendant picked N.'s pocket; N.'s statements to that effect were given by the witness, in spite of the defendant's demand that N. be called; Sir Matthew Hale was judge).

1670, Style's Practical Register 173 (citing a case of 1646).

[1] It is worth noting that the not uncommon belief which attributes most of the reforms in the rules of evidence in criminal trials to the Commonwealth of 1649 or the Revolution of 1688 is hardly well founded. In the present case, for example, the new idea comes in with the Restoration régime, 1660–1685; and this is generally true of the other matters of improvement. The Commonwealth went on with very much the same practices as the royal government which it overthrew; witness the argument of Mr. Prynne, who was one of the most vigorous opponents of Charles I. (quoted *post*). At the Restoration, much warning seems to have been taken, and it is then that the decided amelioration is apparent; the trials of the Regicides, for instance, were (contrary to the general impression) almost models of fairness, considering the prior practice. What was left to be done was done under Anne, after 1700, rather than under William. Even Scroggs, in 1678, did not much violate existing rules; and the real abuses and irregularities occurred chiefly in the terrible times of unrest and mutual suspicion, just before and after the Duke of York's accession, and at the hands of the unscrupulous Jefferies, whose faults were chiefly his own and abnormal. Compare the similar opinion of Professor Willis-Bund, State Trials for Treason, 1882, vol. II. Introd. xx.

[2] *E. g.* in the cases *infra* of 1680, 1681, 1682, 1686.

[3] *E. g.* in Colledge's Trial, *infra*.

[4] 1673, Pickering *v.* Barkley, Vin. Abr. "Evidence," P, b, 1, vol. XII. 175 (to show the mercantile usage construing a policy, "a certificate of merchants" was read in court; but "the Court desired to have the master of the Trinity-house and other sufficient merchants to be brought into court to satisfy the Court *viva voce*").

1676, Rutter *v.* Hebden, 1 Keb. 754 (objected that a contradictory statement of a witness could not be proved because not made on oath; but allowed).

1678, Bishop Burnet on the Popish Plot, 6 How. St. Tr. 1406, 1422, 1427 (refers to a part of Dugdale's testimony as "only upon hearsay from Evers, and so was nothing in the law").

1678, Earl of Pembroke's Trial, ib. 1309, 1325, 1336 (a deceased person's statements as to person injuring him, received; one of the statements was offered as a death-bed declaration; and counsel adds, "there are little circumstances which are always

(3) At the same time, and along with this general rule of exclusion, there is still a doctrine, clearly recognized, that a hearsay

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allowed for evidence in such cases, — where men receive any wounds, to ask them questions, while they are ill, about it, who hurt them").

1678, Ireland's Trial, 7 id. 79, 105 (the defendant, to prove an alibi at St. Omer's college in France, offered to bring "an authentic writing" "under the seal of the college and testified by all in the college, that he was there all the while"; Atkins, J.: "Such evidences as you speak of we would not allow against you; therefore we would not allow it for you"; afterwards, members of the college were produced in person).

1679, Samson *v.* Yardly, 2 Keb. 223 (appeal of murder; what a witness, now dead, swore on the indictment was excluded; "what the witness dead had said generally, being but hearsay of a stranger, and not of a party [in] interest, they would not admit, which might be true or false").

1680, Anderson's Trial, 7 How. St. Tr. 811, 865 (charge of being a priest and saying mass at the Venetian ambassador's; a letter of the ambassador, then out of the kingdom, denying his saying of mass, not admitted for the defendant).

1680, Gascoigne's Trial, ib. 959, 1019 (one Barlow being offered as a witness, but being apparently afraid to speak, one Ravenscroft offered to tell what Barlow had told him the night before; Pemberton, J.: "You must not come to tell a story out of another man's mouth"; yet after some objection he was allowed to tell the whole story).

1681, Plunket's Trial, 8 id. 447, 458 (other persons' statements of defendant's acts, admitted without objection), 461 (Witness: "Mr. L. B. told me that he did hear of the French —"; Pemberton, L. C. J.: "Speak what you know yourself").

1681, Busby's Trial, ib. 525, 545 (witness offers an affidavit of a register of births; Street, B.: "You ought to have brought the man along with you to testify it"; Witness: "The sexton is an old man above 60 years of age and could not come"; Street, B.: "That does not signify anything at all").

1681, Colledge's Trial, ib. 549, 603 (seditious publication; the Attorney General himself stops a prosecution-witness who tells what the printer said as to the author), 628 (another counsel for the prosecution does the same; "we must not permit this for example's sake, to tell what others said"), 663 (Counsel for prosecution: "You must not tell a tale of a tale of what you heard one say").

1682, Lord Grey's Trial, 9 id. 127, 136 (hearsay statements plentifully received without objection).

1684, Hampden's Trial, ib. 1053, 1094 (hearsay statements excluded; Jefferies, L. C. J.: "You know the law; why should you offer any such thing?").

1684, Braddon's Trial, ib. 1127, 1181, 1189 (Mr. J. Withins: "We must not hear what another said that is no party to this cause").

1686, Lord Delamere's Trial, 11 id. 509, 548 (hearsay statements put in without check).

1692, Stainer *v.* Droitwich, 1 Salk. 281 (an exception to the hearsay rule discussed as such).

1693, Thompson *v.* Trevanion, Holt 286, Skinner 402 (a hearsay statement, received apparently as an exception).

1696, Charnock's Trial, 12 How. St. Tr. 1377, 1454 (Holt, L. C. J., alludes to the objection as well founded, and informs the jury when charging them: "Therefore I did omit repeating [to you] a great part of what D. said, because as to him it was for the most part hearsay").

1697, Pyke *v.* Crouch, 1 Ld. Raym. 730 (if a testator sends a duplicate of his will

statement may be used as confirmatory or corroboratory of other testimony.[1] Here we have the survival of that notion about sufficiency and quantity, already referred to. A hearsay statement, by itself, is insufficient as the sole foundation for a conclusion; by itself it "can condemn no man," and so, by itself, it is excluded; but, when it merely supplements other good evidence already in, it is receivable. This limited doctrine as to using it in corroboration survived for a long time in a still more limited shape, *i. e.* in the rule that a witness's own prior consistent statements could be used in corroboration of his testimony on the stand;[2] and the latter was probably accepted as late as the end of the 1700's.[3]

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to a stranger "and the stranger sends back a letter" mentioning its receipt, "after the death of the stranger such letter may be read as circumstantial evidence" to prove that such a duplicate was sent).

[1] 1679, Knox's Trial, 7 How. St. Tr. 763, 790 (the witness's former statement offered; L. C. J. Scroggs: "The use you make of this is no more but only to corroborate what he hath said, that he told it him while it was fresh and that it is no new matter of his invention now").

1683, Lord Russell's Trial, 9 id. 577, 613 (L. C. J. Pemberton: "The giving evidence by hearsay will not be evidence"; Attorney-General: "It is not evidence to convict a man if there were not plain evidence before; but it plainly confirms what the other swears").

1692, Cole's Trial, 12 id. 876 (Mrs. Milward: "My lord, my husband [now deceased] declared to me that he and Mr. Cole were in the coach with Dr. Clenche, and that they two killed Dr. Clenche"; Mr. J. Dolben: "That is no evidence at all, what your husband told you; that won't be good evidence, if you don't know somewhat of your own knowledge"; Mrs. Milward: "My lord, I have a great deal more that my husband told me to declare"; Mr. J. Dolben: "That won't do; what if your husband had told you that I killed Dr. Clenche, what then? This will stand for no evidence in law; we ought by the law to have no man called in question but upon very good grounds, and good evidence upon oath, and that upon the verdict of twelve good men." Nevertheless, he let her relate more of what her husband told her about the plot to kill Dr. Clenche; in charging the jury, he referred to it as "no evidence in law . . . especially when it is single, without any circumstance to confirm it").

1725, Braddon, Observations on the Earl of Essex' Murder, 9 How. St. Tr. 1229, 1272 ("It is true, no man ought to suffer barely upon hearsay evidence; but such testimony hath been used to corroborate what else may be sworn").

[2] 1682, Lutterell *v.* Reynell, 1 Mod. 282 (it was proved that one of the witnesses for the plaintiff had often "declared the same things" as now; and L. C. B. Bridgman "said, though a hearsay was not to be allowed as direct evidence, yet it might be made use of to this purpose, viz. to prove that W. M. was constant to himself, whereby his testimony was corroborated").

Ante 1726, Gilbert, Evidence, 149 ("A mere hearsay is no evidence; . . . but though hearsay be not allowed as direct evidence, yet it may be in corroboration of a witness' testimony, to show that he affirmed the same thing before on other occasions; . . . for such evidence is only in support of the witness that gives in his testimony upon oath").

[3] 1767, Buller, Trials at Nisi Prius, 294.

(4) In the meantime, the general rule excluding hearsay statements comes over into the 1700's as something established within living memory. It is clear that its firm fixing (as above observed) did not occur till about 1680; and so in the treatises of the early 1700's the rule is stated with a prefatory "It seems."[1] By the middle of the 1700's the rule is no longer to be struggled against;[2] and henceforth the only question can be how far there are to be specific exceptions to it.

What is further noticeable is that in these utterances of the early 1700's the reason is clearly put forward why there should be this distinction between statements made out of court and statements made on the stand; the reason is that "the other side hath no opportunity of a cross-examination." This reason receives peculiar emphasis in the final and comprehensive application of the rule to a peculiar class of statements made prior to the trial in hand, namely, statements made under oath. These come now to be considered.

II. *Hearsay statements under oath.* (1) As early as the middle of the 1500's a first step had been attempted towards requiring the personal production of those who had already made a statement upon oath. This requirement was limited to trials for treason; and the circumstances leading up to its introduction are described in the following passage:

1696, Bishop *Burnet*, arguing in the House of Lords, at Fenwick's Trial, 13 How. St. Tr. 537, 752: "There passed many attainders in that reign

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[1] 1716, Hawkins, Pleas of the Crown, II. 596, b. II. c. 46, § 44 ("As to the Fifth Point, viz. of parol evidence, and how far hearsay shall be admitted. It seems agreed that what a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross-examination").

1736, Bacon, Abridgment, Evidence, (K) ("It seems agreed that what another has been heard to say is no evidence, because the party was not on oath; also, because the party who is affected thereby had not an opportunity of cross-examining").

[2] 1701, Captain Kidd's Trial, 14 How. St. Tr. 147, 177 (Witness: "Here is a certificate [of my reputation] from the parish where I was born;" L. C. B. Ward: "That will signify nothing; we cannot read certificates; they must speak *viva voce*").

1716, Earl of Wintoun's Trial, 15 How. St. Tr. 804, 856.

1723, Bishop Atterbury's Trial, 16 id. 323, 455.

1725, L. C. Macclesfield's Trial, ib. 767, 1137.

1743, Craig dem. Annesley *v.* Anglesea, 17 id. 1160 (a statement of Mrs. P., deceased, as to a material fact was offered; after some debate, the Court excluded it "on the principal reason that hearsay evidence ought not to be admitted, because of the adverse party's having no opportunity of cross-examining").

1754, Canning's Trial, 19 id. 383, 406 (rule undisputed).

[of H. VIII.], only upon depositions that were read in both houses of parliament. It is true, these were much blamed, and there was great cause for it. . . . In Edward VI.'s trial, the lord Seymour was attainted in the same manner [*sc.* without being heard], only with this difference, that the witnesses were brought to the bar and there examined, whereas formerly they proceeded upon some depositions that were read to them. At the duke of Somerset's trial [in 1551], which was both for high treason and for felony, in which he was acquitted of the treason but found guilty of the felony, depositions were only read against him, but the witnesses were not brought face to face, as he pressed they might be.[1] Upon which it was that the following parliament enacted that the accusers (that is, the witnesses) should be examined face to face, if they were alive."[2]

The statute of 1553 thus referred to as first requiring the witness's production on the trial was St. 5 Edw. VI. c. 12, § 22.[3] This was followed by a similar provision in 1554, St. 1 & 2 P. & M. c. 10, § 11.[4] But this early step was premature; the innovation was too much in advance of the times; and it had only a short life. From the very year of the latter enactment, until the end of the succeeding century, it remained by judicial construction a dead letter. The means by which this result was reached was another section (§ 7) in the act of Philip and Mary, providing that trials for treason should be conducted "according to the common law," *i. e.* without any requirement of two witnesses or of producing witnesses; so that since the requirement of § 11 applied only to trials for the treasons defined by that very statute, the Crown, by bringing prosecutions on other definitions of treason (common law or statutory), was free from any such requirement.[5]

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[1] This may be seen in the duke's trial, in 1 How. St. Tr. 520.

[2] Substantially the same account as Bishop Burnet's is given in Rastal's Statutes (?), I. 102, as quoted in a note to the Duke of Somerset's Trial, 1 How. St. Tr. 520; but no edition of any of Rastal's books seems to contain such a passage.

[3] "Which said accusers at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow and maintain that which they have to say to prove him guilty," unless he confesses.

[4] Upon arraignment for treason, the persons "or two of them at the least," who shall declare anything against the accused "shall, if they be then living and within the realm, be brought forth in person before the party arraigned if he require the same, and object and say openly in his hearing what they or any of them can against him."

[5] 1554, Throckmorton's Trial, 1 How. St. Tr. 862, 873, 880, 883 (the defendant in vain invoked the treason-statute).

1571, Duke of Norfolk's Trial, ib. 958, 978, 992 (by the prosecuting Serjeant: "the

This judicial construction was perhaps strained, and was abandoned after the Revolution and under William III.'s government. Nevertheless it was clear law for a century and a half; and, when Sir Walter Raleigh insisted so urgently on the production of Lord Cobham, he was truly answered by Chief Justice Popham that "he had no law for it." [1]

Thus this limited attempt to require personal production, instead of *ex parte* depositions by absent persons, perished at its very birth. So far as this statutory attempt at the beginnings of a hearsay rule is concerned, it played no further part at all; except perhaps as furnishing a moral support for the opinion which was already working towards a general hearsay rule.

(2) That at this time, then (say, until the early 1600's), the general absence of any hearsay rule (as already noted) allowed equally the use of this specific class, namely, extra-judicial state-

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law was so for a time, in some cases of treason, but since the law hath been found too hard and dangerous for the prince, and it hath been repealed").

1586, Abington's Trial, ib. 1142, 1148 ("You stand indicted by the common law and the statute of 25 Edw. III., . . . and in that statute is not contained any such proof").

1603, Raleigh's Trial, 2 id. 16, 18; Jardine's Cr. Tr. I. 418, 420 (Popham, C. J. "Sir Walter Raleigh, for the statutes you have named, none of them help you. The statutes of the 5th and 6th of Edward VI. and of the 1st Edward VI. are general; but they were found to be inconvenient and are therefore repealed by the 1st and 2d of Philip and Mary, which you have mentioned, which statute goes only to the treasons therein comprised, and also appoints the trial of treasons to be as before it was at the common law").

1649, Lilburne's Trial, 4 How. St. Tr. 1269, 1401 (same rule). Compare the decisions by which the same result was reached for the requirement of two witnesses: 15 HARV. L. REV. 83.

There was another similar statute about the same time, but it apparently was ineffective for the same reason: 1558, St. 1 Eliz. c. 1, § 27.

[1] The learned Mr. Jardine, in his Criminal Trials, I. 514, has vindicated this trial against the unjust criticisms of later times: "This doctrine and practice [of 1690 and later], however, though directly the reverse of those which preceded them, were not founded upon any legislative provision or any recorded decision of the Courts. But at the period of Raleigh's trial, there was, perhaps, no point of law more completely settled, than that the statute of the 1 & 2 Philip and Mary, c. 10, had repealed the provisions of the statute of the 5th of Edward VI., respecting the production of two witnesses in cases of treason. . . . If, therefore, the Judges who presided on Raleigh's trial were to abide by the solemn and repeated decisions of their predecessors, and the uniform practice of the courts of law for centuries, they could do no otherwise, consistently with their duty, than decide as they did."

Probably the great dramatist had Raleigh's notable trial in mind, when he wrote (about 1613) of Buckingham's trial, in King Henry VIII. ii. 1: "The king's attorney, on the contrary, Urged on the examinations, proofs, confessions, Of divers witnesses; which the duke desired To have brought *viva voce* to his face."

ments taken under oath, is clear enough. It appears as well in ordinary felony trials[1] as in treason trials.[2]

(3) It had, of course, always been usual (though, as just seen, not essential) to have the deponent present at the trial; but in such cases the general practice in state trials seems to have been, first to read aloud his sworn statement to the jury, and then to have him confirm it by declaring that it was "willingly and voluntarily confessed without menace or torture or offer of torture."[3] This went on till well into the 1600's. The sworn statement was still the main or the sufficient thing; but it was thought proper to have it openly adopted by the witness, so as to show that the prosecution did not fear a recantation. Thus the emphasis came gradually to be transferred from the sworn statement, as the sufficient testimony, to the statement on the trial as the essential thing.

(4) About this time, however, and markedly by the middle of the 1600's (coincidently with the general movement already consid-

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[1] 1615, Weston's Trial, 2 How. St. Tr. 911, 924.

1615, Elwes' Trial, ib. 935, 941.

[2] To the instances of this already cited above, construing the treason statute, may be added the following:

1571, Duke of Norfolk's Trial, 1 How. St. Tr. 958, *passim*.

1586, Mary Queen of Scots' Trial, ib. 1162, 1183.

1590, Udall's Trial, ib. 1271, 1302.

Mr. Jardine, in his Criminal Trials, I. 514, says: "At the time of Raleigh's trial, most of the circumstances objected to by Sir John Hawles [under William III., about 1696] were strictly legal and justifiable; for instance, at that time, the depositions of absent persons were read, as the usual course of evidence which had prevailed for centuries in state prosecutions; this mode of proof constituted the general rule, and the oral examination of witnesses was the exception, which was in practice sometimes allowed, but was as often refused, and never permitted but by the consent of the counsel for the prosecution." He also asserts (Introd. I. 25) that "the ordinary mode of trying persons indicted for murder, robbery, or theft" forbade the use of depositions; but his only authority for this statement is Sir Thomas Smith's description of a trial, which does not sustain him; and the citations in the preceding note above seem to disprove his belief.

[3] The following list is only a selection:

1586, Babington's Trial, 1 How. St. Tr. 1127, 1131.

1589, Earl of Arundel's Trial, ib. 1250, 1252.

1600, Earl of Essex' Trial, ib. 1333, 1344.

1616, Earl of Somerset's Trial, 2 id. 965, 978. Compare the cases cited in 33 Amer. Law Rev. 376 ("Confessions; a Brief History").

The following case indicates a growing inclination to insist on this *viva voce* confirmation where the original examination was technically defective:

1631, Lord Audley's Trial, 3 How. St. Tr. 401, 402 ("certain examinations having been taken by the lords without an oath, it was resolved [by all the judges] those could not be used until they were repeated upon oath").

ered) the notion tends to prevail, and gradually becomes definitely fixed, that even an extra-judicial statement under oath should not be used if the deponent can be personally had in court. This much has now been gained; and it is seen in civil and in criminal trials equally. His statement, though, can still be used if he cannot be had in person, — for example, because of his death (and there is much vacillation of opinion as to the sufficiency of other causes, such as absence beyond sea); and nothing is as yet said as to the further objection that the deposition was not taken subject to cross-examination. The significant feature of this stage is the thought that the hearsay statement is usable only in case of necessity, *i. e.* the deponent ought to be produced if he can be.[1] But

[1] The first suggestion of this view seems to occur in the following cases:

1583, Puckley *v.* Bridges, Choice Cases in Ch. 163, quoted 1 Swanst. 171 (witnesses deceased and beyond seas; depositions in the Star Chamber, etc., used).

1590, Udall's Trial, 1 How. St. Tr. 1271, 1283, (examination on oath of one T. read, T. being beyond seas; but it does not appear that the latter circumstance was essential).

In Raleigh's Trial (1603), 2 id. 16, 18, Raleigh is willing to concede that Lord Cobham's deposition could have been used, "where the accused is not to be had conveniently"; yet there it was used, though Cobham was "alive, and in the House." But thereafter the precedents indicate a general acceptance of the notion stated above:

1612, Tomlinson *v.* Croke, 2 Rolle's Abr. 687, pl. 3 (deposition receivable if the deponent is dead, not if he is living).

1613, Fortescue & Coake's Case, Godb. 193 (depositions in chancery not to be read at law "unless affidavit be made that the witnesses who deposed were dead").

1629, Anon., ib. 326 ("if the party cannot find a witness," then his deposition "in an English court, in a cause betwixt the same parties," may be read).

1631, Fitzpatrick's Trial, 3 How. St. Tr. 419, 421 (a defendant in rape demanded that the lady be "produced face to face; which she was; who by her oath *viva voce* satisfied the audience").

1638, Dawby's Case, Clayt. 62 (admitted, when dead).

1645, Lord Macguire's Trial, 4 How. St. Tr. 653, 672 (most of the witnesses spoke *viva voce;* a deposition was used of one who "was in town but he could not stay").

1658, Mordant's Trial, 5 id. 907, 922 (all sworn except one, an escaped prisoner, whose deposition was used).

1666, Lord Morley's Case, Kel. 55, 6 How. St. Tr. 770 (depositions before a coroner might be read if the deponent were dead, or unable to travel, or detained by defendant; but not if unable to be found).

1673, Blake *v.* Page, 1 Keb. 36 (speaks of the affidavit of an absent person as allowable, but apparently by consent only).

1678, Bromwich's Case, 1 Lev. 180 (like Lord Morley's Case).

1678, Earl of Pembroke's Trial, 6 How. St. Tr. 1309, 1338 (a physician offers his prior deposition before the magistrate; the Court: "You must give it again *viva voce;* we must not read your examination before the Court").

1685, Oates' Trial, 10 id. 1227, 1285 (deposition of a witness not found after search, excluded).

1692, Harrison's Trial, 12 id. 833, 851 (deposition taken by the coroner in the defendant's absence, read because the defendant had eloigned the deponent).

When this necessity for the witness's absence could be foreseen (as when a deposi-

the thought that in any case there must indispensably have been an opportunity for cross-examination has not been reached.

(5) By the middle of the 1600's, the orthodox tradition in favor of allowing the use of extra-judicial sworn statements had thus become decidedly weakened and was on the point of giving way. Nevertheless, there was still a tradition of orthodoxy; and this tradition was in harmony with the practice of influential modes of trial other than trial by jury in the common law courts.[1] A fixed rule to the contrary was consciously an innovation; and this innovation, though now on the point of prevailing, remained still to be established and to acquire orthodoxy. From the middle of the century we see the idea still progressing. The state of opinion is illustrated by one of the prosecutions conducted by the anti-Stuart party just before it obtained the upper hand and deposed Charles I.:

1643, Col. *Fiennes'* Trial, 4 How. St. Tr. 185, 214; the defendant, tried by court-martial, argued that "no paper-deposition ought to be allowed by the law, in cases of life and death, but the witnesses ought to be all present and testify *viva voce*": that he had not had notice of the commission "so that he might cross-examine the witnesses"; then Mr. *Prynn*, for the prosecution, answered, among other things, that in the civil law and courts-martial trials were as usual "by *testimoniis* [*i. e.* depositions] as by *testibus viva voce;* that in the Admiralty, a civil law court, as likewise in the Chancery, Star-Chamber, and English courts formed after the civil law, they proceed usually by way of deposition; that even at the common-law in some cases, depositions taken before the coroner, and examinations upon oath before the chief justice or other justices, are usually given in evidence even in

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tion *de bene* was asked for before trial), there are some early indications that cross-examination would be a required condition: 1606, Matthews *v.* Port, Comb. 63 ("The witnesses may be examined [prior to trial] before a judge, by leave of the Court, as well in criminal causes as in civil, where a sufficient reason appears to the Court, as going to sea, etc., and then the other side may cross-examine them").

1662, St. 13–14 Car. II, c. 23, § 5 (in certain insurance claims, seamen being often the witnesses, an oath *de bene* may be administered, "timely notice being given to the adverse party, and set up in the office before such examination, to the end such witness or witnesses may be cross-examined").

[1] *Ante* 1635, Hudson, Treatise of the Star Chamber, pt. III. § 21, in Hargr. Collect. Jurid. 200 ("It is a great imputation to our English courts that witnesses are privately produced," in chancery; pointing out that the ecclesiastical court does otherwise, and reciting a recent reform of L. C. Egerton that witnesses should be produced before the opponent, "that the other side might examine him also if they please").

1637, Bishop of Lincoln's Trial, 3 How. St. Tr. 769, 772 (Banks, Attorney-General, arguing in the Star-Chamber, says: "The proceedings in this Court, as in all other Courts, is by examination of witnesses returned in parchment, not *viva voce*").

capital cases; that the high court of Parliament hath upon just occasions allowed of paper depositions in such cases"; and the depositions were "upon solemn debate" admitted.

This case, to be sure, was no precedent for a common law trial, and it occurred amidst a bitter political controversy; but it sufficiently illustrates the unsettled state of opinion and the tendency of the time.[1] Yet no final settlement came under the Commonwealth, nor under the Restoration, nor directly upon the Revolution.[2]

(6) By 1680–1690 (as already noted above) had come the establishment of the general rule against unsworn hearsay statements. This must have helped to emphasize the anomaly of leaving extra-judicial sworn statements unaffected by the same strict rule. By 1696, or nearly a decade after the Revolution, that anomaly ceased substantially to exist. A few rulings under the Restoration had foreshadowed this result;[3] but in that year

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[1] A reflection of the English rule in this period is seen in the following colonial records:

1660, Mass. Revised Laws and Liberties, Whitmore's ed., "Witnesses," § 2 (a witness' testimony may be taken before the magistrate, but, if the witness lives within ten miles and is not disabled, it shall not be used "except the witness be also present to be further examined about it; provided also that in capitall cases all witnesses shall be present, wheresoever they dwell"; repeated in the Revision of 1672).

1692, Proprietor *v.* Keith, Pa. Colon. Cas. 117, 124 (affidavits were offered to prove the truth of a libel; but the Court "were very unwilling to have them read, saying it was no evidence unless the persons were present in court"; yet they permitted some to be read, since the witnesses could not be present "by reason of the extremity of the weather"). See also Browne's History of Maryland, 84.

[2] Mr. Jardine, in his Criminal Trials, Introd., I. 25, 29, says: "The ancient mode of proof by examinations [under oath of absent persons] continued to be the usual and regular course [in cases of treason or other state offences] during the reigns of Elizabeth, James I., and Charles I. . . . During the Commonwealth the practice of reading the depositions of absent witnesses entirely disappeared, and has never been since revived. . . . It is believed that not a single instance can be produced of the reading of the deposition of an absent witness on the trial of a criminal (except in cases expressly provided for by statute), since the reign of Charles I." It would seem that the instances in note 1, p. 452, *supra*, show the practice to have been sanctioned until after the Revolution; Mordant's Trial, above cited, certainly shows that it did not cease during the Commonwealth. Mr. Jardine seems to have had a general but incorrect notion that the older methods ceased with the Commonwealth; for example, that torture did not cease, as he believes it did, has been noticed in the article cited *ante*, in note 3, p. 451.

[3] *Ante* 1668 (no date or name), Rolle's Abr. II. 679, pl. 9 (depositions taken by bankruptcy commissioners, not admitted, "in a suit in which comes in question whether he was a bankrupt or not, or to prove anything depending on it, for the other party could not cross-examine the party sworn, that is the common course").

1669, R. *v.* Buckworth, 2 Keb. 403 (perjury; testimony of a deceased witness

it was definitely and decisively achieved, in the trials of Paine and of Sir John Fenwick. The former was a ruling by the King's Bench after full argument, and came in January.[1] The latter, coming in the next November,[2] involved a lengthy debate in Parliament; and, though the vote finally favored the admission of the deposition, the victory of reaction was in appearance only; for the weighty and earnest speeches in this debate must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination, and made it impossible thereafter to dispute the domination of that rule as a permanent element in the law.[3] From this time on, the appli-

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sworn at the trial where the perjury was committed, received; by two judges to one).

Ante 1680, Hale, Pleas of the Crown, I. 306 ("The information upon oath taken before a justice of the peace" is admissible in *felony*, if the deponent is unable to travel, yet in *treason* this is "not allowable, for the statute requires that they be produced upon arraignment in the presence of the prisoner, to the end that he may cross-examine them").

1688, Thatcher *v.* Waller, T. Jones 53 (deposition before the coroner of one beyond sea, admitted; but held that a deposition before a justice of the peace should not be received; the case of the coroner standing on the ground of a record).

1694, R. *v.* Taylor, Skinner 403 (affidavit not admissible); and the citations at the end of note 1, p. 452, *supra*.

[1] 1696, R. *v.* Paine, 5 Mod. 163 (libel; a deposition of B., examined by the mayor of Bristol upon oath but not in P.'s presence, was offered; it was objected that "B. being dead, the defendant had lost all opportunity of cross-examining him," and the use of examinations before coroners and justices rested on the special statutory authority given them to take such depositions; the King's Bench consulted with the Common Pleas, and "it was the opinion of both Courts that these depositions should not be given in evidence, the defendant not being present when they were taken before the mayor and so had lost the benefit of a cross-examination"; the reports of this case in 1 Salk. 281, 1 Ld. Raym. 729, are brief and obscure).

[2] It is a little singular that R. *v.* Paine is not cited by any of the numerous debaters in Fenwick's Trial. The date of the former is given as Hilary Term, 7 Wm. III., which must have been January, 1696, or ten months before Fenwick's Trial. It is cited in Bishop Atterbury's Trial, in 1723, *infra*.

[3] 1696, Fenwick's Trial, 13 How. St. Tr. 537, 591–607, 618–750 (the sworn statement before a justice of the peace of one Goodman, said to have absented himself by the accused's tampering, was offered on a trial in Parliament; a prolonged debate took place, and this deposition, termed hearsay, was opposed on the precise ground of "a fundamental rule in our law that no evidence shall be given against a man, when he is on trial for his life, but in the presence of the prisoner, because he may cross-examine him who gives such evidence," "by which much false swearing was often detected"; the deposition was finally admitted, on Nov. 16, by 218 to 145 in the Commons, and the attainder passed by 189 to 156 in the Commons and by 66 to 60 in the Lords; but it is clear from the debate that many of those voting to receive the deposition did so on the theory that Parliament was not bound to follow the rules of evidence obtaining in the inferior Courts; the speeches claiming that those rules would admit it were half-

cability of the hearsay rule to sworn statements in general, as well as to unsworn statements, is not questioned.[1] From the beginning of the 1700's the writers upon the law assume it as a settled doctrine;[2] and the reason of the rule in this connection is stated in the same language already observed in the history of the rule in general, namely, that statements used as testimony must be made where the maker can be subjected to cross-examination.[3]

(7) There were, however, two sorts of sworn statements which, being already expressly authorized by statute, though not expressly made admissible, might be thought to call for special exemption, namely, the sworn examination of witnesses before justices of the peace in certain cases, and of witnesses before a coroner. That the rule excluding depositions taken without cross-examination should be applied to those of the former sort was not settled until the end of the 1700's.[4] That it should apply to those of the latter sort never

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hearted and evasive; moreover, the prosecution only ventured (595) to offer it as "corroborating evidence"; see *supra*, note 1, p. 447).

[1] The last remnant of hesitation is found in Bredon *v.* Gill (1697), 2 Salk. 555, 1 Ld. Raym. 219, 5 Mod. 279 (question whether on statutory appeal from excise-commissioners to appeal-commissioners depositions below could be used or the witnesses should "be brought in again personally and be examined *viva voce*"; ruled at first that "the law does not make *viva voce* evidence necessary, unless before a jury; in other cases depositions may be evidence"; but afterwards, *mutata opinione*, the Court required examination *de novo*). But the persistence with which the older notion lingered on is seen in Bishop Atterbury's Trial, 16 How. St. Tr. 323, 463, 471, 495, 503, 523, 536, 595, 607, 608, 616, 673; here an examination before the Council, not on oath, of one since dead, was on an impeachment voted by a majority of the Lords to be received; but the vote was clearly the result of hot partisanship, and the managers of the impeachment conceded that their evidence was not legal; in this trial the first citation of R. *v.* Paine occurs, at p. 536.

[2] 1730, Emlyn, Preface to State Trials, 1 How. St. Tr. xxv: ("The excellency therefore of our laws above others I take to consist chiefly in that part of them which regards criminal prosecutions. . . . In other countries . . . the witnesses are examined in private and in the prisoner's absence; with us they are produced face to face and deliver their evidence in open court, the prisoner himself being present and at liberty to cross-examine them").

Ante 1726, Gilbert, Evidence, 58 ff.

1747, Eade *v.* Lingood, 1 Atk. 203 (deposition before bankruptcy commissioners, excluded).

[3] See the quotations in the preceding six notes.

[4] 1739, R. *v.* Westbeer, 1 Leach Cr. L., 4th ed., 12 (deceased accomplice's information upon oath, admitted, though it was objected that the defendant "would lose the benefit which might otherwise have arisen from cross-examination").

1762, Foster, Crown Law, 328 (the eminent author regards a deceased deponent's examination before either coroner or justices as admissible, not discriminating as to the accused's presence and cross-examination).

1789, R. *v.* Woodcock, 2 Leach Cr. L., 4th ed., 500 (justice of the peace's examination of the victim of an assault, excluded).

came to be conceded at all in England,[1] — at least, independently of statutory regulation in the 1800's; and long tradition availed to preserve the use of these, though only as a distinct exception to a general rule. That general rule, from the beginning of the 1700's, was clearly understood to exclude alike sworn and unsworn statements made without opportunity to the opponent for cross-examination. From that period the rule could be broadly stated in the words of a judge writing just two centuries later:[2] "Declarations under oath do not differ in principle from declarations made without that sanction, and both come within the rule which excludes all hearsay evidence."

One noteworthy consequence, having an important indirect influence on other parts of the law of evidence, was the addition of a new activity to the accepted functions of the counsel for an accused person. In 1695[3] counsel had been allowed, in treason only, to make full defense for the accused; but until 1836[4] no law allowed this in felony. Yet as soon as the right of cross-examination was established, it was indispensable that trained counsel should be permitted to conduct it, if it were to be effective.[5] And so in a short time this practice (without technical sanction) forced itself on the judges in criminal trials:

1883, Sir *James Stephen*, History of the Criminal Law, 1. 424: "The most remarkable change introduced into the practice of the courts [from the middle of the eighteenth century] was the process by which the old rule which deprived prisoners of the assistance of counsel in trials for felony was gradually relaxed. . . . In Barnard's trial [in 1758] his counsel seem to have cross-examined all the witnesses fully. . . . On the other hand, at the trial of Lord Ferrers two years later, the prisoner was obliged to cross-examine the witnesses without the aid of counsel. . . . The change [of law by the statute of 1836] was less important than it may at first sight seem to have been."

Indirectly, this resulted speedily in a new development, to a degree before unknown, of the art of interrogation and the various

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1790, R. *v.* Eriswell, 3 T. R. 707 (justice of the peace's examination of a pauper as to his settlement; a divided Court).

1801, R. *v.* Ferryfrystone, 2 East 54 (the excluding opinion of the preceding case confirmed).

[1] R. *v.* Eriswell, *supra*.

[2] 1889, Vann, J., in Lent *v.* Shear, 160 N. Y. 462, 55 N. E. Rep. 2.

[3] St. 7–8 Wm. III. c. 3.

[4] St. 6–7 Wm. IV. c. 114.

[5] By the prosecuting counsel it had of course already been employed, *e. g.* 1688, Seven Bishops' Trial, 12 How. St. Tr. 183.

rules of evidence naturally most applicable on cross-examinations, — particularly, the impeachment of witnesses. Furthermore, it resulted ultimately in the breakdown of the old fixed tradition that a criminal trial must be finished in one sitting. The necessary sifting of testimony by cross-examination took double and treble the time used of yore. Under vast inconvenience, the old tradition was preserved,[1] until at last it gave way, from very exhaustion, to the new necessities.[2]

What we find, then, in the development of the Hearsay Rule is: (1) A period up to the middle 1500's, during which no objection is seen to the use by the jury of testimonial statements by persons not in court; (2) Then a period of less than two centuries, during which a sense arises of the impropriety of such sources of information, and the notion gradually but definitely shapes itself, in the course of hard experience, that the reason of this impropriety is that all statements to be used as testimony should be made only where the person to be affected by them has an opportunity of probing their trustworthiness by means of cross-examination; (3) Finally, by the beginning of the 1700's, a general and settled acceptance of this rule as a fundamental part of the law.[3] Such, in brief, seems to have been the course of development of that most characteristic rule of the Anglo-American law of evidence, — a rule which may be esteemed, next to jury-trial, the greatest contribution of that eminently practical legal system to the world's jurisprudence of procedure.

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[1] "Mr. Erskine made his celebrated speech in Lord George Gordon's case, 1781, after midnight, and the verdict was given at 5.15 A. M., the Court having sat from 8 P. M. the previous day. In 1794, in Hardy's case, the Court sat from 8 till past midnight" (Sir H. B. Poland, A Century of Law Reform, 1901, p. 63).

[2] Until the trial of Hardy, in 1794, "there had not yet been an instance of a trial for high treason that had not been finished in a single day" (Campbell, Lives of the Chancellors, 5th ed., VIII. 307).

[3] It therefore does not date back so far as our judges have sometimes fondly predicated, — for instance, "to Magna Charta, if not beyond it" (Anderson *v.* State, 89 Ala. 12, 7 So. Rep. 429; 1890).

ACCORD AND SATISFACTION.

"FROM time immemorial the acceptance of anything in satisfaction of the damages caused by a tort would bar a subsequent action against the wrong-doer."[1] As this doctrine arose long before the validity of simple contracts was recognized, it is obvious that it was not by virtue of any preliminary agreement or accord between the parties, but only by virtue of the ultimate acceptance of the satisfaction that the discharge was effected. The only importance of the accord was as evidence to prove that the performance relied upon by the defendant as satisfaction was actually received by the plaintiff as such. This would be proved as well by the plaintiff's offer to receive the thing as satisfaction as by a bilateral agreement between the parties by which the plaintiff promised to receive the thing as satisfaction and the defendant promised to give it. There was, therefore, no occasion to distinguish between a mere offer on the part of the plaintiff and a bilateral contract. The distinction is now, however, of great importance. If there is a mere offer or promise by the creditor to accept something as satisfaction and the debtor makes no promise to give it, the offer of the creditor is revocable at his pleasure and the rights of the parties are unchanged until the agreed satisfaction is actually given and received. This distinction is not always observed in the cases.[2] The word accord, to avoid confusion, should be used only to designate a bilateral contract, by which the defendant promises to give the proposed satisfaction, and the plaintiff promises to accept it.[3]

It might well be supposed that such an accord would have been recognized as a valid contract as soon as the validity of other bilateral contracts was recognized, but such was not the case.

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[1] 9 HARV. L. REV. 55, by Professor Ames, citing Y. B. 21 & 22 Edw. I. 586 (Rolls series); Y. B. Hen. VI. 25–13; Y. B. 34 Hen. VI. 43–44; Andrew *v.* Boughey, Dyer, 75, pl. 23.

[2] Cases in which there seems to have been merely an offer by the creditor are: Wray *v.* Milestone, 5 M. & W. 21; Francis *v.* Deming, 59 Conn. 108; Harbor *v.* Morgan, 4 Ind. 158; Burgess *v.* Denison Mfg. Co., 79 Me. 266; Cannon Rivers Assoc. *v.* Rogers, 46 Minn. 376; Hawley *v.* Foote, 19 Wend. 516; Keen *v.* Vaughan's Ex., 48 Pa. St. 477.

[3] Langdell, Summ. Cont. § 87.

The courts were doubtless led astray by the assumption that if the contract of accord was valid, it necessarily would be a defense to the original cause of action. Even burdened with this assumption, the Court of King's Bench said, in 1681,[1] that "though in Peyto's case, and formerly, it hath been held that an accord cannot be pleaded unless it appears to be executed, 9 Co. 79 b, 3 Cro. 46, pl. 2, yet of late it hath been held that upon mutual promises an action lies, and consequently, there being equal remedy on both sides, an accord may be pleaded without execution as well as an arbitrament, and by the same reason that an arbitrament is a good plea without performance; to which the court agreed; for the reason of the law being changed, the law is thereby changed; and anciently remedy was not given for mutual promises, which now is given."

But this *dictum* being urged in the Common Pleas twenty years later in the case of Allen *v.* Harris[2] as a reason for holding an accord unexecuted a defense to an action, the court gave judgment for the plaintiff, saying: "If arbitrament be pleaded with mutual promises to perform it, though the party has not performed his part who brings the action, yet he shall maintain his action; because an arbitrament is like a judgment, and the party may have his remedy upon it. But upon accord no remedy lies. And the books are so numerous that an accord ought to be executed that it is now impossible to overthrow all the books. But if it had been a new point, it might be worthy of consideration."

Accordingly in Lynn *v.* Bruce[3] breach of a bilateral agreement to give and receive a specified sum of money as satisfaction for a previous cause of action was held to give the plaintiff no right. Eyre, C. J., quoted from the case of Allen *v.* Harris, and gave his approval of the result for a reason not mentioned in the earlier cases. "*Interest reipublicae ut sit finis litium.* Accord executed is satisfaction, accord executory is only substituting one cause of action in the room of another, which might go on to any extent."

The decision of Lynn *v.* Bruce was correct upon its facts, since the accord was in that case merely an agreement to pay part of an admitted debt in satisfaction of the whole,[4] but no such ex-

[1] Case *v.* Barber, T. Ray. 450.
[2] Allen *v.* Harris, 1 Ld. Ray. 122.
[3] 2 H. Bl. 317.
[4] See, however, 13 HARV. L. REV. 38, by Professor Ames.

planation is possible in the case of Reeves *v.* Hearne.[1] Though the declaration in that case set forth mutual promises to do something of detriment to the promisor, and a breach of the defendant's promise, the court held on demurrer that no cause of action was stated. These cases have never been in terms overruled, and the fourth edition of Leake on Contracts[2] on their authority says: "The accord is in the nature of a mere offer which either party may refuse or withdraw; and upon which no action will lie."

Nevertheless it is hardly credible that Reeves *v.* Hearne would now be followed even in England. The case of Crowther *v.* Farrer,[3] though not purporting to overrule it, is in fact inconsistent with it, and allowed recovery of damages for breach of a contract to settle an existing liability by an agreed payment. Other decisions show clearly enough that if an agreement by way of accord is broken, an action may be maintained on the ordinary principles of contract.[4]

The more difficult question is, what effect does the unexecuted accord have upon the previous cause of action? So far as it is possible for the law to reach this result, the effect should be that which the parties intend. Generally no intention is definitely expressed, and it is necessary to resort to inference. When a creditor agrees to accept from his debtor something in satisfaction of the debt in consideration of the debtor's promise to give the satisfaction, it can hardly be supposed that the parties intended that the creditor should immediately have the right to proceed on his original claim, without giving the debtor a chance to give the agreed satisfaction. Temporary forbearance at least must have been contemplated, though not expressly promised. So that if no time is fixed by the parties for the performance of the accord, it is a natural inference that the parties intended that the creditor should forbear for a reasonable time; if a date is fixed by the parties for the performance of the accord, the inference is that the parties intended forbearance upon the original claim to last until that date. In some cases the circumstances show that the parties intended more than a temporary forbearance.

[1] 1 M. & W. 323. To the same effect is Elliott *v.* Dazey, 3 T. B. Mon. 268.

[2] P. 623.

[3] 15 Q. B. 677.

[4] Nash *v.* Armstrong, 10 C. B. N. S. 259; Very *v.* Levy, 13 How. 345, 349; White *v.* Gray, 68 Me. 579, 580; Chicora Fertilizer Co. *v.* Dunan, 91 Md. 144; Hunt *v.* Brown, 146 Mass. 253; Palmer *v.* Bosley, 62 S. W. Rep. 195 (Tenn. Ch.).

They may and sometimes do, in effect, agree that the original liability shall be immediately extinguished and the accord substituted in its place. But this is exceptional.

After the true construction of the accord is determined, its legal effect must be considered. Let it be supposed, first, that the accord was not intended immediately to satisfy and destroy the original cause of action, and further that the creditor, in violation of his agreement, brings action on the original cause before the time has arrived for the debtor to give the agreed satisfaction. If the debtor pleads the accord, the defense cannot be sustained.[1] To sustain it would lead to the result that even though the debtor subsequently failed to perform the accord, the creditor's claim would be barred, for judgment having once been given for the defendant on that very cause of action the matter has become *res judicata*. Of course, the creditor could sue upon the accord, but to limit his rights to this would in effect put him in the same position that he would have occupied if he had agreed to accept the accord and not its performance as the satisfaction of the debt. The rule of the common law, therefore, that an unexecuted accord is no defense is based on sound principles.

The case may be carried a step further. Suppose the debtor within the time agreed or within a reasonable time tenders performance of his promise, but the creditor in violation of his agreement refuses to accept the performance in satisfaction of his claim, and brings suit on the original cause of action. Here, too, the unexecuted accord is no defense.[2] The creditor's claim is not

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[1] Many decisions to this effect are collected in 1 Am. & Eng. Encyc. of Law (2d ed.) 422. A few recent cases are Crow *v.* Kimball Lumber Co., 69 Fed. Rep. 61 (C. C. A.); Crass *v.* Scruggs, 115 Ala. 258; Martin-Alexander Co. *v.* Johnson, 70 Ark. 215; Goble *v.* American Nat. Bank, 46 Neb. 891; Gowing *v.* Thomas, 67 N. H. 399; Arnett *v.* Smith, 11 N. Dak. 55, 64. The decisions cited in the next note are *a fortiori* in point to the same effect.

[2] Shepherd *v.* Lewis, T. Jones, 6; Lynn *v.* Bruce, 2 H. Bl. 317; Carter *v.* Wormald, 1 Ex. 81; Gabriel *v.* Dresser, 15 C. B. 622; Humphreys *v.* Third Nat. Bank, 75 Fed. Rep. 852, 859; Long *v.* Scanlan, 105 Ga. 424; Woodruff *v.* Dobbins, 7 Blackf. 582; Deweese *v.* Cheek, 35 Ind. 514; Young *v.* Jones, 64 Me. 563; White *v.* Gray, 68 Me. 579; Clifton *v.* Litchfield, 106 Mass. 34; Hayes *v.* Allen, 160 Mass. 34; Prest *v.* Cole, 183 Mass. 283; Hoxsie *v.* Empire Lumber Co., 41 Minn. 548, 549; Clarke *v.* Dinsmore, 5 N. H. 136; Rochester *v.* Whitehouse, 15 N. H. 468; Kidder *v.* Kidder, 53 N. H. 561; Gowing *v.* Thomas, 67 N. H. 399; Russell *v.* Lytle, 6 Wend. 390; Brooklyn Bank *v.* De Grauw, 23 Wend. 342: Tilton *v.* Alcott, 16 Barb. 598; Kromer *v.* Heim, 75 N. Y. 574; Hearn *v.* Kiehl, 38 Pa. St. 147; Blackburn *v.* Ormsby, 41 Pa. St. 97; Hosler *v.* Hursh, 151 Pa. St. 415; Clarke *v.* Hawkins, 5 R. I. 219; Carpenter *v.* Chicago, etc., Ry. Co., 7 S. Dak. 594; Gleason *v.* Allen, 27 Vt. 364.

But see *contra*, Bradley *v.* Gregory, 2 Camp. 383; Very *v.* Levy, 13 How. 345; La-

satisfied. Tender is not the same as performance. To assert such a doctrine is to say that the debtor after making his tender has satisfied his debt, though he is still the owner of the thing which was agreed upon as the satisfaction. Even in the rare case where the tender is not only made, but kept good by setting aside as the creditor's the proposed satisfaction, it involves an extension of the powers of a court of law to give relief. If the court holds that the debt was satisfied and that the tendered property became the property of the creditor by setting it aside for him, the court is doing more than merely ordering specific performance. It is holding that the debtor himself by his own action in appropriating the property to the creditor, in spite of the latter's express refusal to receive it, has himself specifically enforced the bargain transferring title to the creditor and extinguishing the original obligation. Doubtless the law of sales furnishes a certain analogy with such a result. In many jurisdictions a seller may, if the buyer in breach of his contract refuses to receive the goods agreed upon, set them aside for him and sue him for the full price, instead of damages for loss of the bargain,[1] but unless there is no way to work out a just result without such violation of fundamental legal distinctions the analogy should not be followed.

It is clear that the debtor has just reason to complain if the law allows the creditor to proceed at once with his original cause of action without giving the debtor an opportunity to satisfy it as the parties agreed in the accord. Recognized principles, however, suffice to protect the debtor. His grievance is that the creditor has broken the promise of temporary forbearance necessarily implied from the accord, and he should be entitled to the same redress that is allowed for breach of contracts for temporary forbearance where there is no agreement of accord. A covenant or other contract for temporary forbearance is not a good plea at law to an action brought in violation of the contract.[2] To allow such a plea and give judgment for the defendant would involve

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tapee *v.* Pecholier, 2 Wash. C. C. 180; Whitsett *v.* Clayton, 5 Col. 476; Jenness *v.* Lane, 26 Me. 475; Heirn *v.* Carron, 19 Miss. 361; Coit *v.* Houston, 3 Johns. Cas. 243 (overruled); Bradshaw *v.* Davis, 12 Tex. 336; Johnson *v.* Portwood, 89 Tex. 235, 239.

[1] Mechem on Sales, § 1694. In many jurisdictions, however, the seller cannot recover the full price unless the title to the goods had passed. *Ibid.*

[2] Ford *v.* Beech, 11 Q. B. 852; Ray *v.* Jones, 19 C. B. N. S. 416; Dow *v.* Tuttle, 4 Mass. 414; Perkins *v.* Gilman, 8 Pick. 229; Winans *v.* Huston, 6 Wend. 471. See, however, Walker *v.* Nevill, 34 L. J. Ex. 73; Slater *v.* Jones, L. R. 8 Ex. 186; Newington *v.* Levy, L. R. 5 C. P. 607, 6 C. P. 180.

the consequence that the plaintiff could never sue, though he had agreed to temporary forbearance only, and would be repugnant to the rule of the common law that if a cause of action is once suspended, it is gone forever; nor is there better ground for an equitable plea to the action, since equity would not grant a permanent injunction against the creditor's action, for the same difficulty that forbids upholding the plea as a legal defense is equally insuperable to an equitable defense. The defendant is entitled to delay, not to a defense on the merits. The debtor must, therefore, apply to a court of equity powers for a temporary injunction against the prosecution of the action, and such an injunction should be granted.[1] In the case of an accord there is a further difficulty. It will not greatly help the debtor to get a temporary injunction on the express or implied promise of the creditor to forbear if the creditor is permitted ultimately to refuse to accept the agreed satisfaction, and may then enforce his original cause of action. In order to give effectual relief, therefore, equity must specifically enforce the performance of the accord. As a court of law cannot give adequate relief, and as the promise of temporary forbearance necessarily included in the accord gives equity jurisdiction of the matter, there seems good reason for equity to deal with the whole matter by granting specific performance. Though there is strangely little authority upon the matter, and though in the few cases on the point the reasoning is not very full or satisfactory, the result here advocated seems to be justified by the decisions.[2]

Though an executory promise to give something in satisfaction of a cause of action cannot be while unperformed a legal bar to an action upon the original cause, the parties may, as has already been said, agree that an executory promise shall itself be the satisfaction of the old right; and if the claimant accepts a promise with that agreement, his original claim is at once and finally extinguished. Thereafter he must find his only remedy upon the new promise. This doctrine is modern,[3] and it may well be doubted whether early courts would have admitted the possi-

[1] Compleat Attorney (1st ed.) 325; Blake *v.* White, 1 Y. & C. Ex. 420, 424, 426; Greely *v.* Dow, 2 Met. 176, 178. See also Billington *v.* Wagoner, 33 N. Y. 31; Bomeisler *v.* Forster, 154 N. Y. 229.

[2] Very *v.* Levy, 13 How. 345, 349; Apperson *v.* Gogin, 3 Ill. App. 48; Chicora Fertilizer Co. *v.* Dunan, 91 Md. 144. See *Re* Hatton, L. R. 7 Ch. 723.

[3] Good *v.* Cheesman, 2 B. & Ad. 328 (1831), is regarded as the leading case on the point, but the doctrine was not clearly stated until after that decision.

bility, under any circumstances, of an executory simple contract extinguishing an existing cause of action;[1] but the principle seems logically correct, and is now well-settled law.[2]

It is often extremely difficult to determine as matter of fact whether the parties agreed that the new promise should be itself the satisfaction of the original cause of action, or whether they contemplated the performance of the accord as the satisfaction. Unless there is clear evidence that the former was intended, the latter kind of agreement must be presumed, for it is not a probable inference that a creditor intends merely an exchange of his present cause of action for another. It is generally more reasonable to suppose that he bound himself to surrender his old rights only when the new contract of accord was performed. The earliest decision in which it was held that the accord itself might operate as an extinguishment of the creditor's claim was on an agreement of composition;[3] and it is in such instruments perhaps that it is most frequently and naturally inferred that the intention of the parties was to substitute at once the right to the agreed composition for the old claims.

If such is the construction of the agreement, it must follow that even though the accord is never performed the creditor's right to sue on the old claim is lost. If, however, it is the performance of the accord which is to be the satisfaction of the claim, the creditor may, on default in performance of the accord by the debtor, sue either on the accord or on the original cause of action;[4] and similarly, if the creditor, contrary to his agreement,

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[1] The reason given by Eyre, C. J., in Lynn *v.* Bruce, 2 H. Bl. 317, against the validity of unexecuted accords generally, that they are merely "substituting one cause of action in the room of another," is obviously as applicable to an agreement which is itself to be satisfaction of a cause of action as to an agreement where the performance is to be the satisfaction.

[2] Evans *v.* Powis, 1 Ex. 601; Buttigieg *v.* Booker, 9 C. B. 689; Edwards *v.* Hancher, 1 C. P. D. 111, 119; Acker *v.* Bender, 33 Ala. 230; Smith *v.* Elrod, 122 Ala. 269; Heath *v.* Vaughn, 11 Col. App. 384; Warren *v.* Skinner, 20 Conn. 356; Goodrich *v.* Stanley, 24 Conn. 613; Brunswick, etc., Ry. Co. *v.* Clem, 80 Ga. 534; Simmons *v.* Clark, 56 Ill. 96; Hall *v.* Smith, 10 Ia. 45, 15 Ia. 584; Whitney *v.* Cook, 53 Miss. 551; Yazoo, etc., R. Co. *v.* Fulton, 71 Miss. 385; Worden *v.* Houston, 92 Mo. App. 371; Gerhart Realty Co. *v.* Northern Assur. Co., 94 Mo. App. 356; Frick *v.* Joseph, 2 N. Mex. 138; Perdew *v.* Tillma, 62 Neb. 865; Morehouse *v.* Second Nat. Bank, 98 N. Y. 503; Nassoiy *v.* Tomlinson, 148 N. Y. 326; Spier *v.* Hyde, 78 N. Y. App. Div. 151; Babcock *v.* Hawkins, 23 Vt. 561. See also Hunt *v.* Brown, 146 Mass. 253. Compare Campbell *v.* Hurd, 74 Hun 235; Wentz *v.* Meyersohn, 59 N. Y. App. Div. 130; Hosler *v.* Hursh, 151 Pa. St. 415.

[3] Good *v.* Cheesman, 2 B. & Ad. 328.

[4] Babcock *v.* Hawkins, 23 Vt. 561.

sues on the original claim without giving opportunity for the performance of the accord, the debtor need make no attempt to use the accord as a ground for injunction, even though the local law permits him to do so, but may suffer judgment to go against him and resort to a separate action on the accord.[1]

A contract under seal presented some peculiar difficulties. The maxim "*Nihil tam conveniens est naturali aequitate, ut unumquodque dissolvi eo ligamine quo ligatum est*," seemed to forbid discharge by accord and satisfaction as completely as by mere parol agreement. Blake's case,[2] however, decided that a right of action for unliquidated damages for breach of covenant could be discharged in this way. The court distinguished the case from that of a covenant to pay a sum of money. "For there is a difference, when a duty accrues by the deed in certainty, *tempore confectionis scripti*, as by covenant, bill, or bond to pay a sum of money, there this certain duty takes its essence and operation originally and solely by the writing;[3] and therefore it ought to be avoided by a matter of as high a nature, although the duty be merely in the personalty, but when no certain duty accrues by the deed, but a wrong or default subsequent, together with the deed, gives an action to recover damages which are only in the personalty for such wrong or default, accord with satisfaction is a good plea."[4]

Before breach of a covenant, not only was a parol agreement ineffectual to discharge it, but even though property were accepted in satisfaction the covenant was not discharged, whether the covenant was for the payment of money[5] or for the performance of some duty, breach of which would sound in damages.[6] Doubtless equity would, if necessary, enjoin the enforcement of any kind of bond[7] where satisfaction had been given either before or after maturity. The acceptance of property in satisfaction necessarily

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[1] Hunt *v.* Brown, 146 Mass. 253.

[2] 6 Coke 43 *b*.

[3] In further illustration of the theory of our early law, that an obligation to pay money was an immediate conveyance or grant, rather than merely an executory promise to do something in the future, see Langdell, Sum. Cont. § 100; Pollock & Maitland, Hist. of Eng. Law (2d ed.) ii. 205; 8 HARV. L. REV. 252; 14 *idem* 429.

[4] See to the same effect Herzog *v.* Sawyer, 61 Md. 344, 352; Cabe *v.* Jameson, 10 Ired. L. 193; Smith *v.* Brown, 3 Hawks 580.

[5] Spence *v.* Healey, 8 Ex. 668.

[6] Kaye *v.* Waghorne, 1 Taunt. 428; Berwick *v.* Oswald, 1 E. & B. 295; Harper *v.* Hampton, 1 H. & J. 622, 673; Smith *v.* Brown, 3 Hawks 580.

[7] Steeds *v.* Steeds, 22 Q. B. D. 537; Nash *v.* Armstrong, 10 C. B. N. S. 259; Hurlbut *v.* Phelps, 30 Conn. 42; McCreery *v.* Day, 119 N. Y. 1.

imports an agreement never to enforce the original obligation, and covenants to forbear perpetually were early given effect to as a defense, even by courts of law. The reason sometimes given is that such a covenant amounts to a release.[1] The more accurate reason, however, and that generally given in the books, is that circuity of action is thereby avoided.[2] This latter reason is as applicable to the case of a parol contract never to sue as to the case of a covenant not to sue, so that it would seem that even a court of law might well have held satisfaction before breach a defense. There can now be no doubt that wherever equitable defenses are allowed at law, there would now be a good defense to an action at law on the covenant, and probably few courts would hesitate to accept such a defense, even though no statute had authorized the general use of equitable pleas.[3]

A debt of record presented a difficulty similar to that of a debt by specialty. Accordingly it could not be discharged at common law even by payment. By Statute of 4 Anne, c. 16, § 12, this was changed in England. The English statute may be regarded as part of the American common law inheritance, but it did not cover the case of accord and satisfaction, and that has been held within comparatively recent times to constitute no defense to an action on the judgment.[4] It may be doubted, however, whether these decisions would now be followed anywhere. The Supreme Court of the United States, though it holds itself obliged to preserve the distinctions between law and equity as they existed a century ago, has held the defense good,[5] and other decisions are to the same effect.[6]

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[1] Deux *v.* Jefferies, Cro. Eliz. 352.

[2] Hodges *v.* Smith, Cro. Eliz. 623; Lacy *v.* Kynaston, 2 Salk. 575, s. c. 1 Ld. Ray. 690; 12 Mod. 551; Ford *v.* Beech, 11 Q. B. 852, 871. See also Smith *v.* Mapleback, 1 T. R. 441, 446; Ledger *v.* Stanton, Johns. & H. 687.

[3] Green *v.* Wells, 2 Cal. 584; McDonald *v.* Mountain Lake Co., 4 Cal. 335; Worrell *v.* Forsyth, 141 Ill. 22 (see also Starin *v.* Kraft, 174 Ill. 120; Jones *v.* Chamberlain, 97 Ill. App. 328); Monroe *v.* Perkins, 9 Pick. 298; Savage *v.* Blanchard, 148 Mass. 348; Siebert *v.* Leonard, 17 Minn. 433, 436; Armijo *v.* Abeytia, 5 N. Mex. 533, 545; Reichel *v.* Jeffrey, 9 Wash. 250.

Cases where a parol agreement to rescind or discharge a sealed contract is held effectual, also *a fortiori* imply that accord and satisfaction would be good.

[4] Riley *v.* Riley, 20 N. J. Law (Spencer) 114; Mitchell *v.* Hawley, 4 Denio 414; Garvey *v.* Jarvis, 54 Barb. 179.

[5] Boffinger *v.* Tuyes, 120 U. S. 198, 205.

[6] *Re* Freeman, 117 Fed. Rep. 680, 684; Jones *v.* Ransom, 3 Ind. 327; McCullough *v.* Franklin Coal Co., 21 Md. 256; Savage *v.* Blanchard, 148 Mass. 348; Weston *v.* Clark, 37 Mo. 568, 572; Fowler *v.* Smith, 153 Pa. St. 639; Reid *v.* Hibbard, 6 Wis. 175.

Though the defense of accord and satisfaction was recognized long before the doctrine of consideration was developed, the requirements for a legally effective satisfaction became confused and regarded as identical with the requirements for the consideration of a promise. As an accord and satisfaction is an executed transaction, and as the validity of the satisfaction as a discharge of the previous cause of action cannot have rested on any view that the satisfaction was rather the consideration of a promise of perpetual forbearance than a technical extinction of the old cause of action, the essentials of consideration and of satisfaction might well have varied. But it was not unnatural that what had been regarded as inadequate to work a satisfaction of a cause of action should also have been regarded as insufficient consideration, and later that whatever was insufficient consideration should be inadequate also for the satisfaction of a cause of action. Brian, C. J., said in 1455 of an attempted satisfaction by part payment: "The action is brought for 20 pounds and the concord is that he shall pay only 10 pounds which appears to be no satisfaction for 20 pounds. For payment of 10 pounds cannot be payment of 20 pounds. But if it were a horse, which horse is paid according to the concord, that is a good satisfaction; for it does not appear whether the horse is worth more or less than the sum in demand."[1] This doctrine soon became settled law, but Coke at least expressly distinguished the doctrine of consideration, and held that though part payment of a debt could not in the nature of things be a satisfaction of the debt, it might be consideration for a promise.[2] Lord Ellenborough, however, made no such distinction, and regarded, apparently, consideration as a test both for satisfaction and for executory contract. "There must be some consideration for the relinquishment of the residue; something collateral to shew a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*."[3]

In Cumber *v.* Wane,[4] Pratt, C. J., said: "It must appear to the court to be a reasonable satisfaction; or at least the contrary

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Accord and satisfaction was held a good plea to an action on a foreign judgment in Hardwick *v.* King, 1 Stew. (Ala.) 312.

[1] Y. B. 33 Hen. VI. 48 A. pl. 32; 12 HARV. L. REV. 521.

[2] Bagge *v.* Slade, 3 Bulst. 162.

[3] Fitch *v.* Sutton, 5 East 230, 232. The early cases are stated and discussed by Professor Ames, in 12 HARV. L. REV. 524.

[4] 1 Stra. 426.

must not appear." But in modern cases no such test is applied. The same rule that governs the formation of contracts — that the adequacy of the consideration is for the parties — governs the satisfaction of causes of action. Thus in Cooper *v.* Parker,[1] Parke, B., said: "The court cannot enter into a consideration of the value of the satisfaction, which upon the face of it is uncertain." So in Curlewis *v.* Clark, an incomplete bill of exchange was held a good satisfaction; Alderson, B., saying: "We cannot value the signature of the Earl of Mexborough; possibly it may be worth something as an autograph." [2]

Though the common case where an agreed satisfaction is held ineffectual for lack of consideration arises when part of a liquidated and undisputed debt has been paid,[3] doubtless decisions on other facts would turn on similar principles.[4] Thus where performance of a duty other than a debt is held insufficient consideration to support a promise, such performance would also be held insufficient to satisfy any cause of action. The legal requirements in this respect for a valid satisfaction should, therefore, be sought under the heading of consideration.

It seems obvious that nothing can operate as a satisfaction, unless both debtor and creditor agree that it shall, but there is one commonly recurring state of facts where this principle seems to be lost sight of by many courts. The case is this: A debtor sends to a creditor whose claim is unliquidated or disputed a check with a letter stating that the check is sent in full satisfaction of the claim, and that if the creditor is unwilling to accept it as such he must return it. The creditor takes the check, but immediately writes a letter stating that he refuses to accept the check as full satisfaction, but will apply it in reduction of the indebtedness. Upon these facts the English Court of Appeal held that there was no satisfaction of the cause of action,[5] and a few jurisdictions in the United States have made the same ruling.[6] But the great weight of authority in the United States is to the con-

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[1] 15 C. B. 822, 828.

[2] 3 Ex. 375, 379. See also Reed *v.* Bartlett, 19 Pick. 273.

[3] See these cases collected and distinctions discussed in 12 HARV. L. REV. 525 *et seq.*; 1 Am. & Eng. Encyc. 413 *et seq.*

[4] Leake on Contracts (4th ed.) 622.

[5] Day *v.* McLea, 22 Q. B. D. 610.

[6] Louisville, etc., Ry. Co. *v.* Helme, 22 Ky. L. Rep. 964; Rosenfield *v.* Fortier, 94 Mich. 29. See also Mortlock *v.* Williams, 76 Mich. 568; Krauser *v.* McCurdy, 174 Pa. St. 174; Rapp *v.* Giddings, 4 S. Dak. 492.

trary.[1] It is said that the acceptance of the check necessarily involves an acceptance of the condition upon which it was tendered.

If the parties are dealing orally with one another and the debtor offer the creditor a check in full satisfaction which the creditor takes, it must be inferred that he assents to the terms. If the creditor refuses to receive the check in full satisfaction and yet takes it, either he must have assented to the terms, or the debtor must have assented to the creditor's refusal, for the voluntary giving of the check by one, and the taking it by the other, if neither misunderstood the words that were spoken, necessarily indicate assent,[2] and it becomes a question of fact, what the bargain was to which they assented. But if the debtor laid down the check and departed, saying, if this is taken it is full satisfaction, it is hard to see why the creditor may not steal or convert the check. Doubtless, if he take the check, saying nothing, his taking will be equivalent to an expression of assent to the offer, whatever his mental intent,[3] and even if he indicate by some act or word at the time that he takes the check that his intention is not to treat the debt as satisfied, he should still be regarded as assenting to the terms of the debtor's offer, for under the circumstances the debtor has reason to suppose that the taking of the check is an expression of assent unless informed to the contrary.[4] But if as soon as

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[1] Potter *v.* Douglas, 44 Conn. 541; Hamilton *v.* Stewart, 108 Ga. 472; Ostrander *v.* Scott, 161 Ill. 339; Lapp *v.* Smith, 183 Ill. 179; Bingham *v.* Browning, 197 Ill. 122; Michigan Leather Co. *v.* Foyer, 104 Ill. App. 268; Talbott *v.* English, 156 Ind 299, 313; Neely *v.* Thompson, 75 Pac. Rep. 117 (Kan.); Anderson *v.* Standard Granite Co., 92 Me. 429, 432; Fremont Foundry Co. *v.* Norton, 92 N. W. Rep. 1058, 1060 (Neb.); Nassoiy *v.* Tomlinson, 148 N. Y. 326; Logan *v.* Davidson, 162 N. Y. 624; Lewinson *v.* Montauk Theatre Co., 60 N. Y. App. Div. 572; Whitaker *v.* Eilenberg, 70 N. Y. App. Div. 489; Petit *v.* Woodlief, 115 N. C. 120; Hull *v.* Johnson, 22 R. I. 66; McDaniels *v.* Rutland, 29 Vt. 230; Connecticut River Lumber Co. *v.* Brown, 68 Vt. 239. See also Bull *v.* Bull, 43 Conn. 455; Cooper *v.* Yazoo, etc., R. Co, 35 So. Rep. 162 (Miss.); Pollman Coal Co. *v.* St. Louis, 145 Mo. 651; McCormick *v.* St. Louis, 166 Mo. 315, 335; Perkins *v.* Hadley, 49 Mo. App. 556. As to the necessity of an explicit statement that the check sent is intended as full payment, compare Fremont Foundry Co. *v.* Norton, 92 N. W. Rep. 1058 (Neb.); Whitaker *v.* Eilenberg, 70 N. Y. App. Div. 489; Amer *v.* Folk, 28 N. Y. Misc. 508; Boston Rubber Co. *v.* Peerless Wringer Co., 58 Vt. 551; Van Dyke *v.* Wilder, 66 Vt. 583.

[2] Cooper *v.* Yazoo, etc., Ry. Co. 35 So. Rep. 162 (Miss.). See also Porter *v.* Cook, 114 Wis. 60.

[3] Keck *v.* Hotel Owners' F. I. Co., 89 Ia. 200.

[4] Hull *v.* Johnson, 22 R. I. 66. In this case the debtor wrote on the check: "Good only . . . if endorsed in full of all demands." The creditor struck this out and cashed the check. The court said: "The erasure on the check was not made in the presence

the check is taken notice is promptly given to the debtor that it is not taken as satisfaction, it seems impossible to find the elements of a bargain. The most forcible argument upon the other side is that the creditor should not be allowed to assert his tortious conversion of the check, though the effect of such a ruling is to fix upon the creditor a bargain which he never made. The case of sending the check by mail is essentially the same as that just discussed, in that the creditor is given the power in fact to take the check without making an agreement with the debtor, though forbidden to exercise such power.

The question whether accord and satisfaction entered into by the creditor with a person other than the debtor discharges the debt has been much disputed. Even though the third person pays in money the exact amount of the debt there can in strictness be at most an accord and satisfaction, for, as payment by A is a different thing from payment by B, the obligation has not been performed according to its tenor. In the early case of Grymes *v.* Blofield[1] the defendant pleaded to an action of debt satisfaction given by a third person, but it was held no plea. This is inconsistent with a still earlier case thus stated by Fitzherbert:[2] "If a stranger doth trespass to me and one of his relations, or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied. *Quod tota curia concessit.*" Grymes *v.* Blofield was followed in Edgcombe *v.* Rodd,[3] and though its correctness seems to have been doubted in Jones *v.* Broadhurst,[4] where Cresswell, J., considered the question elaborately, the English law was settled soon after by several cases thus summarized by Baron Parke in Simpson *v.* Eggington:[5]

"The general rule as to payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise, has been fully considered in the cases of Jones *v.* Broadhurst, 9 C. B. 193; Belshaw *v.* Bush, 11 C. B.

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of the defendants, and could not have been known to them until the check had reached their bank and had been paid. The plaintiff gave them no notice of his rejection of their offer, but took their money."

[1] Cro. Eliz. 541. This case is elaborately considered in Jones *v.* Broadhurst, 9 C. B. 173, 195 *et seq.*, and the result of an examination of the original rolls is stated.

[2] Tit. "Barre," pl. 166.

[3] 5 East 294. See also Thurman *v.* Wild, 11 A. & E. 453.

[4] 9 C. B. 173, 193.

[5] 10 Ex. 844.

191, and James *v.* Isaacs, 22 L. J. C. P. 73; and the result appears to be that it is not sufficient to discharge a debtor unless it is made by the third person, as agent for and on account of the debtor, and with his prior authority or subsequent ratification. In the first of these cases, in an elaborate judgment delivered by Mr. Justice Cresswell, the old authorities are cited, and the question whether an unauthorized payment by and acceptance in satisfaction from a stranger is a good plea in bar is left undecided. It was not necessary for the decision of that case. In Belshaw *v.* Bush, it was decided that a payment by a stranger considered to be for the defendant and on his account, and subsequently ratified by him, is a good payment; and in the last case of James *v.* Isaacs, a satisfaction from a stranger, without the authority, prior or subsequent, of the defendant, was held to be bad."[1]

In Simpson *v.* Eggington[2] it was held that ratification might be made at the trial of such an action.

In the United States the weight of authority sustains the validity of the defense,[3] though wherever there is any evidence that the payment or satisfaction was made on behalf of the debtor and was ratified by him, these facts are relied upon.[4] In New York, however, the strictness of the early English law has been maintained,[5] and a similar result has been reached in Kentucky[6] and Missouri.[7]

The difference in the authorities is of less importance than it might seem on first consideration. The courts which require the satisfaction to be made on behalf of the debtor and ratified by him

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[1] See in accord with James *v.* Isaacs, Kemp *v.* Balls, 10 Ex. 607; Lucas *v.* Wilkinson, 1 H. & N. 420.

[2] 10 Ex. 844.

[3] Harrison *v.* Hicks, 1 Port. (Ala.) 423; Underwood *v.* Lovelace, 61 Ala. 155; Martin *v.* Quinn, 37 Cal. 55; White *v.* Cannon, 125 Ill. 412; Poole *v.* Kelsey, 95 Ill. App. 233, 240; Ritenour *v.* Mathews, 42 Ind. 7; Binford *v.* Adams, 104 Ind. 41; Thompson *v.* Conn. Mut. L. I. Co., 139 Ind. 325, 345; Harvey *v.* Tama County, 53 Ia. 228; Porter *v.* Chicago, etc., Ry. Co., 99 Ia. 351, 359; Oliver *v.* Bragg, 15 La. Ann. 402; Leavitt *v.* Morrow, 6 Oh. St. 71; Royalton *v.* Cushing, 53 Vt. 321, 326; Gray *v.* Herman, 75 Wis. 453.

[4] See the careful opinions in Snyder *v.* Pharo, 25 Fed. Rep. 398, and Jackson *v.* Pennsylvania R. Co., 66 N. J. Law 632.

[5] Clow *v.* Borst, 6 Johns. 37; Daniels *v.* Hallenbeck, 19 Wend. 408; Bleakley *v.* White, 4 Paige 654; Muller *v.* Eno, 14 N. Y. 597, 605; Atlantic Dock Co. *v.* New York, 53 N. Y. 64; Dusenbury *v.* Callaghan, 8 Hun 541, 544. *Cf.* Hun *v.* Van Dyck, 26 Hun 567; affirmed without opinion, 92 N. Y. 660. See also Wellington *v.* Kelly, 84 N. Y. 543; Knapp *v.* Roche, 92 N. Y. 329, 334.

[6] Stark's Adm. *v.* Thompson's Ex., 3 T. B. Mon. 296, 302.

[7] Armstrong *v.* School District, 28 Mo. App. 169. See also Carter *v.* Black, 4 Dev. & Batt. 425, 427.

are disposed to find these facts upon rather slight evidence. The difficulty is generally that the third person did not purport to act on behalf of the debtor. If the payment was so made as to be capable of ratification, there can be no difficulty so far as the debtor himself is concerned in making out such ratification. The mere assertion by the debtor that the debt has been satisfied though made by plea or at the trial after action has been brought on the debt is sufficient. If the question whether the debt has been paid comes in issue between the creditor and third persons, then indeed trouble may arise over the question of ratification.

Even though satisfaction from a third person does not legally discharge the obligation, there may be ground for an equitable defense. There must be implied from the creditor's acceptance of the satisfaction a promise to forbear perpetually to sue the original debtor. Whether the original debtor can enforce this promise in any jurisdiction should depend upon the doctrines there held in regard to the enforcement by third persons of contracts for their benefit or for the discharge of obligations due to them.[1] If the promise is enforceable by the original debtor, either a permanent injunction or an equitable plea at law is an appropriate remedy.

It has been held in England that before ratification by the debtor, it is competent for the creditor and the third person to rescind their arrangement, and the original debtor will then still continue liable.[2] In this case, too, if it be granted that satisfaction by a third person is not a legal discharge, the correctness of the result depends on the doctrine held as to the right of parties to a contract in which a third person is interested, to rescind it.[3]

Samuel Williston.

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[1] See 15 HARV. L. REV. 767; Armstrong *v.* School District, 28 Mo. App. 169.

[2] Walter *v.* James, L. R. 6 Ex. 124. In this case the creditor when he received payment thought that it was authorized by the debtor, and the fact that he accepted the payment under this mistake had weight with the court.

[3] See 15 HARV. L. REV. 799.

THE MERGER CASE.[1]

THREE Jerseymen, whom we will call Morgan, Hill and Lamont, own each a cart and one horse. Their occupation is the carrying of eggs and chickens from the neighboring farmers to a market town over the New York border. They agree to form a corporation under the name of the Interstate Poultry Traffic Association. The only capital they turn in consists of their horses and carts, except a few dollars contributed to pay for their charter. Are they criminals liable to be fined $5,000 apiece and imprisoned for a year?

This simple but typical case seems to serve better to test the doctrines laid down in the Merger decision than the sensational facts which were there actually before the court.

There are two questions:

I. Could Congress declare such men to be criminals?

II. Has Congress declared them to be criminals?

I. Congress has full power over interstate commerce. The power to regulate commerce includes the power to destroy it by an embargo or by a prohibitive protective tariff, and such regulation can be enforced by criminal statutes.

Can Congress say to a person actually engaged in interstate commerce: "You shall not dispose of a share in your business in such a way as will put you under a temptation to carry on interstate commerce in a manner we deem injurious to the public"? Would an Act of Congress to that effect be constitutional?

Harlan, Brown, McKenna, and Day, JJ., hold that it would be constitutional, and so, perhaps, does Brewer, J.

Mr. Justice White (with whom it would seem that Fuller, C. J., and Holmes and Peckham, JJ., agree) thinks that it would not.

On this point, the first opinion seems correct, although the dangers of the abuse of the power are so great and so obvious that one reaches the conclusion with reluctance.

Congress cannot interfere with manufactures or agriculture on the ground that their products will be the subjects of interstate

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[1] This notice of Northern Securities Company *v.* The United States, decided in the Supreme Court of the United States, March 14, 1904, has been prepared at the request of the Editors of the HARVARD LAW REVIEW.

commerce, but here it is proposing to interfere with (or, to use the words of the Constitution, to "regulate") interstate commerce itself; it is endeavoring to prevent a state of things which it believes will have a direct effect, not on the price of the transported article, but on the cost of the transportation itself.

II. Has Congress declared them to be criminals?

If it has done so, it is by virtue of 26 U. S. St. 209 (1890), an Act entitled "An Act to protect trade and commerce against unlawful restraint and monopolies."

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and" subjected to the same penalty as under the first section.

SEC. 3. Contains similar provisions as to commerce between the States and the District of Columbia or the Territories.

SEC. 4 and SEC. 5. Give the Circuit Courts authority to issue injunctions to restrain violations of the Act.

"SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this Act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States," etc.

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Judge Holmes justly calls attention to the fact that this Statute is a penal, a severely criminal statute, and also that it cannot receive a different interpretation on a bill for an injunction than it is to receive on an indictment.

It is a wholesome rule of the common law that penal statutes must be construed strictly, — a rule which has of late years been too much neglected by our courts. They are greatly given to construing a statute taking away a man's property or liberty of action as if it were a contract into which he had entered.

What does the Statute make criminal? *First:* It makes criminal "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *Secondly:* It declares that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations" shall be deemed guilty of a crime.

The prevention of competition is not criminal unless it is a restraint of trade or a monopolizing.

A contract in restraint of trade is something well known to the common law. It is a contract by which a person carrying on a business agrees with another to abandon or restrict that business.

Monopolizing a business is excluding outsiders from carrying on the business.

In our typical case, and in the case of the Northern Securities Company, there was no contract by which a person or corporation abandoned or restricted his own business. If a junction of interest is a restraint of trade, then two expressmen who have been carrying on business between the city of New York and Jersey City became criminals by forming a partnership. Such an intention is not to be lightly attributed to a respectable legislative body like Congress.

Neither was there any monopolizing of the business. If our egg-collectors had combined to drive or keep another person off their route, they would have violated the Act. If the Great Northern Railway Company and the Northern Pacific Railway Company had combined to keep another railroad out of the territory which they served, that would have been a monopoly.

Therefore, if it is an open question, the opinion of Judge Holmes, and of the judges who agreed with him, that there had been no violation of the Statute, seems the better. But is it an open question, or is it concluded by the cases of United States *v.* Freight Association,[1] and United States *v.* Joint Traffic Association?[2]

[1] 166 U. S. 290.

[2] 171 U. S. 505.

There agreements between certain railroad corporations establishing rates between themselves were held to violate the Statute. There was no "monopolizing," for there was no attempt to exclude other railroads from business. The contract must have been held void because in restraint of trade.

Judge Holmes says he has no desire to criticise or abridge these decisions. He seems to consider the agreements between the railroads as amounting to several contracts by each railroad with strangers in restraint of its own business, and therefore as coming within the ordinary definition of contracts in restraint of trade. But is this so?

The direct object of the ordinary common law contract in restraint of trade is the infliction of a detriment in carrying on his trade upon the tradesman, for the benefit of a stranger; that it may have the effect of limiting competition is only an indirect consequence. But the Traffic agreements had not for their direct object the infliction of a detriment upon any railroad in carrying on its business, but, on the contrary, to confer benefits upon them all in carrying on their business. The common law contract in restraint of trade restrains a man from carrying on business of a certain kind or in a certain place. But the Traffic agreements did not restrain a railroad from doing any business in any place, or from making as high charges as it wished. The object of the agreement was to secure a railroad from being forced to charge less than it wished. The limiting of competition was the primary object of the contract. Such an agreement may be a contract to forestall or engross or do something else naughty, but it does not appear to come within what had previously been deemed the definition of a contract in restraint of trade. The Traffic Association Cases do, therefore, appear to have held that the Statute covered not merely common law contracts in restraint of trade, and monopolies, but also extended to contracts which were neither, but were contracts to limit competition. On this point, we find it difficult to follow Judge Holmes. This does not mean that Judge Holmes is wrong in his conclusion, and the Traffic Association decisions right, but simply that his conclusion seems not consistent with those decisions.

A distinction between the Traffic Cases and the Merger Case has been much insisted upon. In the Traffic Cases, it is said, the agreement directly limited competition, while in the Merger Case the agreement merely gave the opportunity to limit competition;

but it seems as if taking the step of extending the Statute to cover every contract limiting competition was the passing of the Rubicon, and that the Court might then well take the further step.

Perhaps the position of Judge Brewer is the most significant feature of the Merger Case. He was with the majority of the Court in the Traffic Association Cases, and to the correctness of the result in those cases he adheres. He would, therefore, it is presumed, still hold that a contract limiting competition in interstate commerce, although neither a common law contract in restraint of trade nor a monopoly, might be within the Statute; but now, apparently shocked by the possible result of a doctrine which might send to prison two expressmen who had formed a partnership to carry between two towns in adjoining states, or the brakemen on an interstate railroad who had struck for an eight hour day, he energetically declares that, in contradiction to what was said in the Traffic Association Cases, an agreement, in order to violate the Statute, must be in *unreasonable* restraint of trade.

Now that Judge Brewer has, in so marked a manner, repudiated the doctrine which was the ground of the opinions in the Traffic Cases, where he was with the majority, and that Judge Peckham, who delivered these opinions, is one of the minority in the Merger Case, the Traffic Association Cases must be considered, to speak familiarly, as having received a black eye, or rather two black eyes.

The Statute is still capable of being abused, but from the worst abuses the Supreme Court, as at present constituted, will protect the community, and we can join in Judge Holmes's expression of satisfaction that only a minority of the Court adopt an interpretation of the statute which "would make eternal the *bellum omnium inter omnes* and disintegrate society as far as it could into individual atoms."

J. C. G.

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INSANITY AS A DEFENSE TO A TORT ACTION. — As a general rule, insane persons are liable for their torts.[1] Public policy is thought to overcome the technical difficulty that since such people are often incapable of volition, the things which they do are not strictly their own acts. Since it is a question which of two innocent estates shall suffer, putting the loss on the property of the insane defendant is thought to secure greater vigilance by his guardians, and to be desirable as protecting the public.[2] It has been suggested that this rule is too strict, and that wherever the state of a man's mind is important, as in negligence or malicious prosecution, insanity should be a defense.[3] The same considerations of public policy, however, apply here, and it is hard to see why, if the law holds a man in spite of his inability to do otherwise, it should not also hold him in spite of his inability to exercise due care or to harbor malice. In this connection the attitude of the courts toward slander and libel is interesting. In America it is considered fairly well settled, on the strength of three or four decisions and several *dicta*, that insanity is a complete defense in such an action.[4] In England the only authority seems to be a *dictum* that it is no defense.[5] The reasons given for the American attitude are two, that malice, of which

[1] See Weaver *v.* Ward, Hob. 134.
[2] McIntyre *v.* Sholty, 121 Ill. 660.
[3] Holmes, Common Law, 109; see 10 HARV. L. REV. 182.
[4] Bryant *v.* Jackson, 6 Humph. (Tenn.) 199; Horner *v.* Marshall's Administratrix, 5 Munf. (Va.) 465; Gates *v.* Meredith, 7 Ind. 440. See Avery *v.* Wilson, 20 Fed. Rep. 856
[5] See Mordaunt *v.* Mordaunt, 39 L. J. Prob. & Matri. 57, 59.

an insane mind is incapable, is a necessary ingredient of these actions, and that presumptively publications from such a source do not injure. On these grounds the Court of Appeals of Kentucky has recently added another decision to the American group. *Irvine* v. *Gibson*, 77 S. W. Rep. 1106.

It is submitted, however, that neither the English *dictum* nor the American doctrine is satisfactory. The liability should not be absolute, nor the defense complete. It is true, malice is usually regarded as essential to libel or slander, but that has come to mean merely "legal malice," which is inferred from the voluntary act.[6] So here again the only reason an insane person should escape is the absence of volition, and it has been seen that that is no defense under the general rule. Even if actual malice were required, however, it is hard to comprehend, as has been said, why public policy may not as well dispense with this as with the necessity of volition. Of course the absence of intent and of malice is always important to prevent punitive damages.

The second reason given for the American attitude is more important. Undoubtedly there is a presumption that the vaporings of a diseased brain do not injure, yet this is not always true. The public may be ignorant of the insanity, or it may be such that the words still have some weight.[7] The presumption that such utterances are not damaging should be a rebuttable presumption, not an absolute one. In ordinary slander, this would leave only the usual burden on the plaintiff, but where an action is maintainable without proof of damage, as in assault, libel, and slanderous words actionable *per se*, it would do away with that exemption. and make it necessary for the plaintiff to show some actual damage before he could succeed. Only when no actual damage can be shown, should the defense be complete.

Contracts in Restraint of Trade within the Sherman Anti-Trust Law. — Probably no current legal question is of such importance to the business world as the meaning of the first section of the Sherman Anti-Trust Law which forbids "every contract, combination . . . or conspiracy, in restraint of trade" among the states. It seems a hopeless effort to attempt to spell out of the mass of federal decisions any serviceable and yet entirely uniform interpretation. At the beginning two positions at least were open to the courts. They might, first, have taken the conservative view that the statute forbids only those unreasonable contracts in restraint of trade which are invalid at the common law.[1] There is good reason to believe that this interpretation of the statute is what the framers had in mind.[2] Viewed in this light, the act merely adds a new federal remedy against the making of contracts in restraint of interstate trade, making penal what before was simply invalid. The opinion has been advanced that all, or nearly all, the cases can be sustained, as decisions on the facts, by this interpretation. But in at least one leading case, dealing with interstate carriers, the Supreme Court held bad a seemingly reasonable traffic agreement, the ground of invalidity being, apparently, that it did away with competition.[3] At common

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[6] Bromage *v.* Prosser, 4 B. & C. 247, 253.
[7] See Dickinson *v.* Barber, 9 Mass. 225; Yeates *v.* Reed, 4 Blackf. (Ind.) 463.

[1] See Rousillon *v.* Rousillon, 14 Ch. D. 351.
[2] Cong. Rec. xxi, pt. 4, pp. 3146, 3148.
[3] U. S. *v.* Trans-Missouri Freight Association, 166 U. S. 290.

law, however, it does not necessarily make a contract invalid that it does away with competition.[4]

In the second place, the courts could say that the act applies to every contract in restraint of trade, reasonable or unreasonable. Whatever may be the state of the cases as decisions on the facts, it is not to be denied that that is the result of the language and reasoning of the opinions.[5] That it was an unfortunate view to take, the decisions of the courts are already demonstrating. When confronted by an ordinary factor's agreement in what would seem obvious restraint of interstate commerce they have held it good, attempting to draw distinctions between direct and incidental restraint, which, if they mean anything, mean the application of the old common law test. Such was the case of the recent decision in *Phillips* v. *Iola Portland Cement Co.*, 125 Fed. Rep. 593 (C. C. A., Eighth Circ.). Here it was agreed between a vendor in Kansas and a vendee in Texas that the latter would not compete with his vendor anywhere beyond the boundaries of the state of Texas. In holding the agreement not within the provisions of the Sherman Act the court said the law must have a reasonable interpretation, and in trying to reach this interpretation it laid down a test of validity that might well have been adopted by a court applying the common law doctrine of reasonableness.

No one, of course, can foretell what the final outcome of the effort to fix the meaning of the Act will be. But one or two things are fairly clear. The courts will prove unwilling to adhere in all cases to the extreme language of the decisions which would make invalid any and every contract in restraint of interstate trade.[6] It is likely, moreover, that the discretion they exercise will follow more and more the old common law test of reasonableness with regard to all parties concerned, for there is no sound basis for discretion except reasonableness.

Liability of Railroad Company to Passengers for Negligence of Connecting Company. — There is much conflict among the authorities as to whether a carrier selling a ticket for a journey to begin on its own line and to terminate on a connecting line is liable for injuries received by the passenger on the connecting line. In England it is held that the carrier is so liable,[1] but most American courts take the view that it is not,[2] unless special circumstances are found from which it may be inferred that the carrier selling the ticket assumes responsibility for the other's negligence. But there is no doubt that a carrier is subject to such liability, if it actually so contracts; power to enter into contracts for the safe carriage of passengers on connecting lines is implied in the charter of every railroad company, so that these agreements are not *ultra vires*.[3] Furthermore, a carrier may sometimes be held liable for an injury received on a connecting line by a passenger who began his journey on that line, but who held a

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[4] Nordenfelt *v.* Maxim Nordenfelt, etc., Co., [1894] A. C. 535.
[5] U. S. *v.* Trans-Missouri Freight Association, *supra*.
[6] See discussion of Northern Securities Co. *v.* U. S. *ante*, p. 474.

[1] Great Western Ry. Co. *v.* Blake, 7 H. & N. 987.
[2] Knight *v.* Portland, Saco, & Portsmouth R. R. Co., 56 Me. 234; *contra*, Little *v.* Dusenberry, 46 N. J. Law 614.
[3] Wheeler *v.* San Francisco & Alameda R. R. Co., 31 Cal. 46.

through ticket to a point on the line of the carrier against which the action is brought. If there is a traffic agreement between two connecting carriers, whereby the net profits of all joint business are to be divided in a fixed proportion, without regard to the amount actually earned on the line of either, this is said to create a partnership, as between the carriers and third persons, so that a passenger holding a through ticket may sue either carrier for any injury he receives on either part of the line.[4]

This was the situation in a late case in the Circuit Court of Appeals for the second circuit. Two railroads were operated as one system, the profits of the joint business being divided according to mileage. It was held that a partnership as to joint traffic had been created, and the representative of a passenger who began his journey and was killed on the road of one of the companies, but who held a ticket to a point on the line of the other, was allowed to maintain an action against the second company. *Lehigh Valley R. R. Co.* v. *Dupont*, 30 N. Y. L. J. 1925 (C. C. A., Second Circ.). It is evident that, on the principles stated above, the defendant would have been liable if the two carriers had been natural persons. As it was, there seems, at first sight, to be much force in the objection that the companies had no power to enter into a partnership, so that no action based on the existence of such a partnership could be maintained. The law generally looks with great disfavor on anything in the nature of a partnership between corporations.[5] Accordingly, a contract between two railroad companies to the effect that the net profits of their whole business, both local and joint, shall be divided in a fixed proportion, is held *ultra vires*.[6] But if, as in the present case, the division of net profits is confined to the joint business, each company taking all the receipts and paying all the expenses of its local business, the contract is not objectionable.[7] This arrangement certainly seems to be as much a partnership as the other: in upholding it, an exception is made to the general rule. But it is not an exception without reason: it is so clearly to the public advantage that connecting railroads be operated as one system that it is not difficult to imply a power to form partnerships for this purpose from the general words of the charter.

Effect of the Registry System on the Doctrine of Estoppel by Deed. — In the United States it has long been settled law that where a conveyance is made with covenants of warranty by one who later gets in the title, the after-acquired title inures by estoppel to the benefit of the grantee.[1] If this estoppel merely creates an equity against the grantor, subsequent purchasers for value without notice should be protected; but if it actually passes the title to the original grantee, at common law later purchasers would be without remedy. Under the registry system, however, a different result may well be reached. Statutes requiring a record of conveyances usually provide that instruments of title shall be of no effect against subsequent grantees and incumbrancers if not recorded. In interpreting these statutes the question arises as to how far the record is effective against the later pur-

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[4] Champion *v.* Bostwick, 18 Wend. (N. Y.) 175.
[5] Mallory *v.* Hanaur Oil Works, 86 Tenn. 598.
[6] Burke *v.* Concord R. R. Corp., 61 N. H. 160.
[7] Swift *v.* Pacific Mail S. S. Co., 106 N. Y. 206.

[1] Somes *v.* Skinner, 3 Pick. (Mass.) 52.

chaser. If he is bound by the record of a deed which lies outside the chain of title, estoppel works against him; otherwise, not. On this point the courts are almost evenly divided.[2] In a recent case, therefore, the Supreme Court of South Dakota was bound by no settled rule of law. A statute, presumably declaratory of the common law, provided that title should pass by estoppel. Because a deed given by the grantor before he acquired title was on the record, the court decided that estoppel passed title to the exclusion of a subsequent grantee, although he had traced his vendor's record title back to a patent from the United States government. *Bernardy* v. *Colonial, etc., Mortgage Co.*, 93 N. W. Rep. 166.

The purpose of the registry acts appears to be to facilitate transfers of property by making it safe to deal with the owners of the record title. Consequently they deprive the grantee under an earlier unregistered conveyance of the common law right which his priority in execution would naturally give him over a subsequent grantee,[3] for the later grantee could have no notice from the record of the previous conveyance. By authority, also, a grantee is not charged with notice of a recorded instrument given by one who nowhere appears on the record as owner.[4] For example, if A sells to B, who fails to record, and transfers to C, who registers his conveyance, this record is not effective against a subsequent purchaser from A. Nor is the record notice to other later grantees than those claiming title from the same grantor.[5] Thus, if A claims under a grant from B, record of a prior conveyance of the same lands by X, an adverse claimant, does not bind A. Moreover, if an instrument is spread upon any but the correct record, it is valueless.[6] These results would seem to indicate that a purchaser is expected simply to use reasonable diligence in looking up his vendor's title. It does not seem reasonable that a purchaser be required to examine the record for conveyances made by his grantor at a time when that same record shows that he had not the land to convey. And since the registry system is due to modern legislation, anything in the common law doctrine of estoppel inconsistent with it should be considered overruled.[7] Therefore it seems unfortunate that a grantee, like the defendant in the principal case, who is so grossly careless as to take a deed from one having neither the legal nor the record title should have preference over a grantee who examines his grantor's record title with all reasonable care.

Suit by One State against Another. — Seldom, indeed, has a fundamental question of constitutional interpretation been so strikingly presented as in *The State of South Dakota* v. *The State of North Carolina et al.*, 24 Sup. Ct. Rep. 269. A private individual holding bonds of the state of North Carolina secured by railway stock in the hands of the state government, donated ten of the bonds to the state of South Dakota. The latter state brought suit, and North Carolina in answer denied the jurisdiction of the court. On this issue the case was decided, the jurisdiction of the court being sustained. Four justices dissented.

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[2] Warburton *v.* Mattox, Morris (Ia.) 367; Calder *v.* Chapman, 52 Pa. St. 359.
[3] See Losey *v.* Simpson, 11 N. J. Eq. 246, 249.
[4] Irish *v.* Sharp, 89 Ill. 261.
[5] Leiby *v.* Wolf, 10 Oh. 83; 2 Pom. Eq. Juris., 2d ed., § 658.
[6] Colomer *v.* Morgan & Valette, 13 La. An. 202.
[7] See Way *v.* Arnold, 18 Ga. 181, 193.

The reasoning of the majority is simple and straightforward. The Constitution, they say, in the second section of the third article extends the judicial power of the United States to controversies between two or more states. The word "controversy," if it means anything, must include a matter so plainly justiciable as a claim for money due on a written promise to pay.[1] The Eleventh Amendment, indeed, forbids suit in a federal court against a state by a citizen of another state or of a foreign state. But as a matter of plain interpretation, sanctioned by the court in time past,[2] this amendment is concerned only with the status of the real parties before the court. Here the real party plaintiff is a state. It follows, then, that although the bonds in the present case were the gift of a private citizen, the court has jurisdiction.

The position of the minority, although less simple, is equally explicit. They rely on the Eleventh Amendment, and insist that it was intended to prevent the prosecution against any state of a suit arising out of dealings between that state and individuals. In support of this view they cite the decisions in Hans *v.* Louisiana[3] and New Hampshire *v.* Louisiana.[4] In the former case a citizen of Louisiana was not allowed to sue that state, the prohibition being held to be within the spirit if not the letter of the eleventh amendment. In the latter, the state of New Hampshire was not allowed to prosecute claims it held in trust for some of its citizens, on the ground that the real parties plaintiff were citizens of another state.

It is difficult to escape the reasoning of the majority. By the Constitution the federal courts are granted jurisdiction in two distinct classes of cases; the first determined solely by the nature of the controversy, the second by the character of the parties. Suits between two or more states would seem to fall within the second class, and it is hard to read into the qualification of the Eleventh Amendment anything which prevents a state when the real party in interest, from suing another state on a claim like that in the principal case. Nevertheless, the court must have reached its conclusion with great reluctance. The difficulties in the way of enforcing decrees against a state government could not have been absent from the minds of the majority although they dismissed them summarily in their opinion.

Possession as a Basis for Assessment of Taxes. — That a state may tax all property within its jurisdiction, even though the owner be a non-resident, is not open to doubt.[1] In the exercise of this power, however, there is often a practical difficulty in discovering the true owner. To avoid this difficulty, statutes have been passed requiring the person in charge of the property to pay the tax and allowing him to reimburse himself at the expense of the owner. It is clear that where such custodian has funds of the owner in his hands this procedure may be justified on the analogy of garnishment, for the custodian as debtor is simply required to discharge an obligation of his creditor. Thus corporations have been compelled to deduct from pay-

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[1] Baldwin, J., in Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 721.
[2] Marshall, C. J., in Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 406.
[3] 134 U. S. 1.
[4] 108 U. S. 76.

[1] Coe *v.* Errol, 116 U. S. 517.

ments due to stockholders the taxes upon the individual shares.[2] But where the custodian has no security of which to avail himself against the true owner, it is equally clear on both reason and authority that he cannot be forced to part with his property in order to pay a debt justly due from another.[3] Accordingly, the Supreme Court of Tennessee has recently condemned a statute imposing a privilege tax upon persons conducting the business of advertising in street cars and making the street-car company which leased the privilege liable for the payment of the tax without providing a means by which such company should be reimbursed. *Knoxville Traction Co.* v. *McMillan*, 77 S. W. Rep. 665.

Where, however, the person compelled to pay has no funds, but has other property of the owner in his possession, some difficulty is apparent. Statutes have made the agent liable for taxes upon the goods of his principal in his possession and have given him a lien upon them as security.[4] The constitutionality of these provisions seems never to have been questioned until recently.[5] In a late decision the Supreme Court of the United States has upheld the constitutionality of a Maryland statute compelling warehousemen to pay the taxes upon liquors stored with them and giving them a lien on such liquors for the amount against the owners. *Carstairs* v. *Cochran*, 24 Sup. Ct. Rep. 318. On authority, therefore, it would seem to be settled that any person who has the property of another in his possession may be required to advance the taxes thereon. In other words, for reasons of convenience he may be compelled to surrender his money and take in return property of a different kind. Such a forced exchange is clearly a deprivation of property. Is it a justifiable deprivation? It cannot be a taking by eminent domain, for there is no pretense of a seizure for necessary public purposes. It might possibly be regarded as an exercise of the police power.[6] Certainly there must be inherent in the state governments the power to use all reasonable methods for the collection of taxes. Whether the method prescribed by the legislature is reasonable will not be too closely inquired into by the courts,[7] and this method might well be sustained.

It has been urged that some cases might arise where the custodian would lose not only his money but also his means of reimbursement; for example, if the tax should be greater than the market value of the goods and the owner should refuse to reclaim, or if the goods were destroyed after the tax was paid. It will be found, however, that if the validity of the forced exchange is once recognized, the following well-established rules will cover all such cases: first, a government lien is always a preferred charge; second, a tax greater than the market value is confiscation, not taxation, and would therefore be invalid for that reason; and third, as soon as the warehouseman has paid the tax, he has a property right in the goods, and it is not unjust to subject this right to all the risks and liabilities of ordinary property.

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[2] Bell's Gap R. R. Co. *v.* Pennsylvania, 134 U. S. 232.
[3] Stapylton *v.* Thaggard, 91 Fed. Rep. 93.
[4] Lockwood *v.* Johnson, Collector, 106 Ill. 334.
[5] 1 Cooley on Taxation, 3d ed., 653. *Cf.* New Orleans *v.* Stemple, 175 U S. 309.
[6] See Prentice, Police Power 361.
[7] See Kirkland *v.* Hotchkiss, 10 U. S. 491, 497–498.

CONTEMPT. — Every superior court has inherent power to punish contempts of its authority. Ordinarily in the case of such offenses the court itself is the sole judge without appeal and imposes penalties as it sees fit.[1] Such an extraordinary power needs of course to be used with great caution, and such has been the common practice of the courts. In a most important class of contempts, however, contempts of an order of a court of equity, the courts have not shown the same conservative tendency. It has long been settled that no one but a party to the proceedings is bound directly by the order of a court of equity.[2] Certain persons not parties to injunction proceedings nevertheless have been held for contempt of court because of acts done with knowledge of the injunction. A most natural and necessary extension of the early rule was made in order to include servants or agents of a person enjoined.[3] If servants or agents were allowed to do what was forbidden to their master or principal, a court of equity could be foiled with impunity. The next step was to hold in contempt any one conspiring or acting in privity with the person enjoined in violating the injunction.[4] From this developed the class of cases of which a recent New York case is an example. All members of the same combination, as for instance the same labor union, are included in the terms of an injunction issued against certain members of the union as parties to the proceedings. As each member is in privity with the others, any one who does the act forbidden comes within the scope of the above rule and consequently is in contempt. *People* v. *Marr*, 88 N. Y. App. Div. 422. These extensions of the old rule were but natural developments, but recent cases have taken a step which necessitates either a new doctrine, or a new idea of privity. Persons not parties to the injunction proceedings have been held in contempt for doing acts enjoined, with knowledge of the injunction, acting wholly independently of the persons enjoined, but for the purpose of assisting them.[5] Nor have the courts stopped there. Persons have been held in contempt for doing the act enjoined with knowledge of the injunction, entirely for their own purposes and with no intention or desire to assist the persons enjoined in any respect.[6]

In these cases as in all the above cases in extension of the original rule the persons held for contempt, not being parties to the injunction proceedings, cannot be held for disobedience of the court's order, but for setting the court at defiance and conducting themselves so as to obstruct the course of justice. It is submitted that whenever one of a numerous body, out of sympathy for the organization, or in order to forward its interests, does an act prohibited by an injunction issued against others of the body as representing all, he may properly be held in contempt, for he is guilty of virtual conspiracy to set the court at naught. Thus also one who knowingly assists the person enjoined in violating the injunction directly or indirectly, whether acting in concert with him or entirely independently, is undoubtedly showing such a criminal disregard of the court's decree. But the case would seem to be very different where the defendant does the act, as for instance trespassing on land, for his own purposes.[6] In holding persons not parties to the injunction proceedings in contempt in such cases, equity seems to be widening its jurisdiction to an extent dangerous to the public and practically certain to result in adverse legislation.

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[1] *In re* Yates, 4 Johns. (N. Y.) 317. [2] Wellesley *v.* Mornington, 11 Beav. 180.
[3] *Ibid.* 181.
[4] Seaward *v.* Paterson, [1897] 1 Ch. 545.
[5] *In re* Reese, 107 Fed Rep. 942.
[6] Chisolm *v.* Caines, 121 Fed. Rep. 397; see also 17 HARV. L. REV. 133.

PRESCRIPTION OTHER THAN IN FEE. — In early times the basis of prescription was the claim of an easement which for time out of mind the owners of the dominant tenement had enjoyed at the expense of the servient. This may have given rise to the rule that prescription can only be in fee, for a right not permanent in its nature could hardly have been exercised from time immemorial. When the cumbrous doctrine of immemorial usage gave way to the more convenient fiction of a lost grant by the servient to the dominant owner,[1] the nature of the right supposed to have been granted did not change, and the fiction was invoked only to establish such easements as could have been prescribed for at common law.[2] A conclusive presumption of a lost grant could, therefore, be made only in respect to an easement which was in its nature a permanent incumbrance on the land. Accordingly it was held that prescription did not run against a tenant for years, for such prescription would have necessarily bound the reversioner, and the court would have been in the anomalous position of conclusively presuming a grant which the tenant had no power to make,[3] and which could have no effect on the reversion had it in fact been made.[4]

In a recent English case where the plaintiff and defendant were both tenants of the same landlord, the question arose whether the continued user of a way on the plaintiff's land gave the defendant an easement. The court held that the defendant had acquired no such right. *Kilgour* v. *Gaddes*, 116 L. T. 341 (Eng., C. A.). It may be doubted whether an easement for the remainder of the plaintiff's term could not have been acquired under the second and eighth sections of the English Prescription Act,[5] and there is some authority to support this view.[6] But if we adopt the view that the Prescription Act applies only to such easements as could have been prescribed for at common law,[7] the result in the principal case necessarily follows, for under the doctrine of a lost grant, prescription could be only in fee, and would not run against a tenant so as to bind his landlord.

It may be questioned whether the result of the principal case would be reached in this country, since in a majority of jurisdictions the doctrine of a lost grant has been discarded, and rights are held to be acquired by prescription solely on the analogy of the statute of limitations.[8] It is true that under this statute adverse possession for the required period against the particular tenant can never affect the rights of a remainderman or reversioner, since possession cannot be adverse to him who has no right of action.[9] Nevertheless, the effect of such possession is to vest in the disseizor whatever title the particular tenant had.[10] There seems to be no reason, therefore, why an easement for a term of years might not be acquired in this country by prescription, nor would this be an undesirable result.

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1 16 HARV. L. REV. 438.
2 Wheaton *v.* Maple, [1893] 3 Ch. 48.
3 Barker *v.* Richardson, 4 B. & A. 579.
4 Gayford *v.* Moffat, L. R. 4 Ch. App. 133.
5 St. 2 & 3 Will. IV. c. 71.
6 Beggan *v.* McDonald, L. R. 2 Ir. 560.
7 Bright *v.* Walker, 1 C. M. & R. 211.
8 Okeson *v.* Patterson, 29 Pa. St. 22.
9 Tilson *v.* Thompson, 10 Pick. (Mass.) 359.
10 Moore *v.* Luce, 29 Pa. St. 260.

Exclusion of Aliens as a Judicial Question. — The power to exclude aliens is one of the essential attributes of sovereignty. It is no longer questioned that there is nothing in the Constitution that forbids the full exercise of this power by the United States: aliens either may be refused admission entirely or may be expelled from the country, after having been once admitted.[1] But it is not always easy to decide what branch of the government is entitled to exercise this power. To be sure, if it is conceded that the person in question is an alien, the case is clear. The power to exclude aliens is an incident to the power to regulate commerce with foreign nations, vested in Congress: it is political in its nature, and is no part of the power vested by the Constitution in the courts.[2] The exclusion proceedings are, in a sense, judicial, in that they involve the ascertaining of whether the person has violated the exclusion laws, but this does not prevent them from being put wholly into the hands of administrative officers, as the proceedings are simply a means of carrying out a power granted to Congress.[3]

But if it is disputed whether the person is, in fact, an alien, a much more difficult question is raised. No citizen of the United States can be refused admission or expelled from the country, except as a punishment for crime.[4] And if a person, restrained of his liberty on the ground that he is an alien, applies to the courts for release, maintaining that he is a citizen, the case seems clearly to be one "arising under the Constitution," to which the judicial power extends. In a recent case, the court follows this line of reasoning, but holds that the Constitution is satisfied if the question of what facts constitute citizenship is left to the courts, while administrative officers have authority to determine conclusively whether these facts exist. *In re Sing Tuck*, 126 Fed. Rep. 386 (Circ. Ct., N. D. N. Y.). The decision is in line with a late case in the Supreme Court,[5] but it seems, as a matter of logic, that the finding of the facts upon which a right of this nature depends is as much a judicial matter as the determining of the law. It is true that there are several cases apparently analogous. Thus, the value of goods passing through the custom house may be conclusively fixed by the appraisers:[6] the officers of the Land Department may decide whether a claimant of part of the public domain has complied with the statutory requirements.[7] But in these cases the officers act simply as the agents of Congress: they are only doing what Congress might have done by express enactment, by virtue of its power to regulate commerce and the public lands. In the present case, on the contrary, the right to enter and remain in the United States is one that Congress could not take away. It is hard to see how executive officers, deriving all their authority from Congress, can determine the existence of facts upon which depends a constitutional right, which Congress is powerless to disturb. If they may do so in this case, why may they not do the like in any controversy between the United States and an individual, except when prevented by the express words of the Constitution? But while the result seems thus objectionable on prin-

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1 Chae Chan Ping *v.* United States, 130 U. S. 581.
2 Fong Yue Ting *v.* United States, 149 U. S. 698.
3 Japanese Immigrant Case, 189 U. S. 86.
4 Lee Sing Far *v.* United States, 94 Fed. Rep. 834.
5 Chin Bak Kan *v.* United States, 186 U. S. 193.
6 Hilton *v.* Merritt, 110 U. S. 97.
7 Quinby *v.* Conlan, 104 U. S. 420.

ciple, the exclusion law could hardly be enforced if the decision were otherwise, and an appeal to the courts allowed in every case. The matter is one peculiarly requiring the summary exercise of executive power.

THE REQUIREMENT OF PRIVITY IN INTERPLEADER. — As a general rule, a person beset by adverse claims for the same thing, willing to relinquish it, but in doubt as to who is entitled, may turn the *res* into court and require the claimants to litigate their claims with each other. The wisdom of the rule is apparent since it prevents the vexation of a third party by two suits when the real issue is between the two claimants. The courts, however, have displayed a tendency to narrow its application by imposing some requirements that seem technical and scarcely justified. One of these is the requirement of privity. As understood with reference to interpleader, privity exists if one of the claimants claims through the other or if both claim from a common source. Privity is clearly established where the connection arises by assignment, and, while not always recognized, it is also generally held that the requirement is met if one claimant is entitled as a constructive *cestui que trust* of the other.[1] A recent Illinois case is to be explained on that ground. *Byers* v. *Samson-Thayer Commission Co.*, 19 Chic. L. J. 753 (Ill., App. Ct.).

It is to be noticed that the question of privity cannot easily arise except in a case where the stakeholder has in his possession a specific chattel. In the case of a debt or obligation, the claimants must necessarily claim through the obligation itself, which ensures privity. A situation may indeed arise in which the claims of the various parties, though different in nature, are nevertheless mutually exclusive. For example, A, claiming to be entitled on a life insurance policy, is given a note in settlement. B then sues the company, claiming to be the beneficiary entitled. In such a case, while it might well be held that a bill in the nature of interpleader should be allowed, a bill of strict interpleader cannot lie,[2] not because of want of privity, but because it is the very essence of interpleader that there must be a dispute as to the same *res*. It follows that the question as to the requirement of privity most often arises when a bailee brings a bill of interpleader.

While there are some cases in which a bailee has been allowed to interplead adverse claimants although no privity existed,[3] yet by the weight of authority it is required.[4] The requirement is believed to have been made on the assumption that a bailee cannot deny his bailor's title. If this assumption were true, as it undoubtedly was in the early law, the fact might afford a reason why interpleader should be denied the bailee, for, since he would be liable to the bailor at all events, his obvious course would be to give the *res* in question to the bailor and defend himself against the other claimant. The more just rule would be to require the bailor, who has placed the bailee in that position, to assume the burden of litigating the actual right to the chattel. If then the bailor failed to establish his right to

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[1] Platte Valley Bank *v.* Nat'l Life Stock Bank, 155 Ill. 250. *Contra*, Third Nat'l Bank *v.* Skillings Lumber Co., 132 Mass. 410; German Sav. Bank *v.* Friend, 20 N. Y. Supp. 434.

[2] Slaney *v.* Sidney, 14 M. & W. 800.

[3] Roberts *v.* Bell, 7 E. & B. 323.

[4] First National Bank *v.* Bininger, 26 N. J. Eq. 345.

it, he could be allowed to prosecute his independent right against the bailee in a supplementary hearing. While this is the modern English practice,[5] under the present law elsewhere, whenever it appears that there is even a possibility of liability to both of the claimants the right of interpleader is denied.[6] But it has long since been established that, if the property belongs to another, the bailee may safely deny his bailor's title.[7] The only reason for the requirement of privity, therefore, does not exist. While several of the more recent cases have allowed interpleader though privity was lacking [8] and although disapproval of the requirement of privity has several times been judicially expressed,[9] it is nevertheless unfortunately true that those cases which have expressly considered the question have continued to recognize the rule.[10]

RECENT CASES.

ALIENS — CHINESE EXCLUSION ACT — NATURE OF PROCEEDINGS. — In a proceeding under the Chinese Exclusion Act, the defendant was alleged to be a Chinese person unlawfully within the United States. The only evidence that the defendant was a Chinese person consisted of a confession obtained under such circumstances that it would be inadmissible in a criminal case. *Held*, that the evidence is inadmissible and the defendant must be discharged. *United States* v. *Hung Chang*, 126 Fed. Rep. 400 (Dist. Ct., N. D. Oh.).

It is well established that the trial of a Chinese person under the Chinese Exclusion Act on the issue whether he is unlawfully within the United States is not a criminal proceeding. *In re Chow Goo Pooi*, 25 Fed. Rep. 77; *Fong Yue Ting* v. *United States*, 149 U. S. 698. The principal case, however, differs from these cases in that the issue is whether the defendant is a Chinese person, while in them this fact was admitted. It can hardly be contended that the issue is criminal, since an adverse finding will result in a conviction for an offence admittedly not criminal. Nevertheless since the right of a person to remain in this country depends on the result and that person may in some cases be an American citizen, constitutional rights may be involved. Moreover proceedings under the act against one proven a Chinese person are most drastic and summary. It seems then that it is advisable to use all possible safeguards in determining this preliminary step, and at least to treat the question in the manner of a criminal question, though it is not strictly such. This result was reached in a case similar to the principal case. *Ex parte Sing*, 82 Fed. Rep. 22.

BAILMENT — LIABILITY OF BAILEE FOR ACTS OF SERVANT. — The plaintiff, a coachbuilder, loaned a carriage to the defendant while the latter's trap was being repaired. The coachman in charge of the defendant's carriage-house, without the permission or knowledge of his master, used the carriage on a frolic of his own and damaged it by his negligence. *Held*, that the defendant is not liable. *Saunderson* v. *Collins*, 116 L. T. 365 (Eng., C. A.).

For a comment on the contrary decision by the lower court, see 17 HARV. L. REV. 198.

BANKRUPTCY — JURISDICTION OF STATE COURTS — EXEMPT PROPERTY. — A creditor had attached property in a state court. The debtor was subsequently adjudicated bankrupt, and his trustee sought to have the attachment dissolved. The creditor resisted on the ground that the chattels attached were exempt property. *Held*, that

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[5] *Ex parte* Mersey Docks and Harbor Board, [1899] 1 Q. B. 546.
[6] National Life Insurance Co. *v.* Pingrey, 141 Mass. 411.
[7] Biddle *v.* Bond, 6 B. & S. 225.
[8] Follet Co. *v.* Albany Co., 61 N. Y. App. Div. 296; Packard *v.* Stevens, 58 N. J. Eq. 489.
[9] Crane *v.* McDonald, 118 N. Y. 648; Bartlett *v.* Sultan, 23 Fed. Rep. 257.
[10] Goodrich *v.* Williamson, 10 Okla. 588.

the state court has no jurisdiction to determine the question of exemption. *Thompson* v. *Ragan*, 78 S. W. Rep. 485 (Ky.).

The state courts have jurisdiction to determine controversies arising between the trustee and third persons in relation to the bankrupt's estate. See *Bardes* v. *Hawarden Bank*, 178 U. S. 524. Hence it might be contended that as the question whether the property in suit was exempt was merely collateral to the controversy, the state court might properly have determined the question. The view taken by the court seems preferable, however. The bankruptcy court has exclusive jurisdiction to determine exemptions as between the bankrupt and the trustee. *In re Overstreet*, 2 Am. B. Rep. 486. The purpose of the exemptions is to leave the debtor means for the support of himself and of his family. See *Moran* v. *King*, 111 Fed. Rep. 730. Hence the right to exemptions would appear to be personal to the bankrupt and one which, to be enforced, must be actively asserted by him in accordance with § 7 a (8). *In re Nunn*, 2 Am. B. Rep. 664. Consequently the creditor would seem properly to have been denied the right to set up the bankrupt's claim to exemptions, at least in a state court. It is thought that this question has not previously been adjudicated.

BANKRUPTCY — RIGHTS OF TRUSTEE — ATTACHMENT LIENS. — In October, 1900, some of the creditors of an insolvent debtor attached a part of his property. Shortly after, he conveyed it by a recorded deed to vendees in accordance with a contract made before the attachment. Within four months of the attachment other creditors of the vendor filed a petition in bankruptcy against him under which he was adjudicated a bankrupt. *Held*, that the trustee in bankruptcy, and not the attaching creditors, is entitled to the benefit of the attachment liens. *In re Baird*, 126 Fed. Rep. 845 (Dist. Ct., W. D. Va.).

The trustee in bankruptcy cannot claim the liens of particular creditors upon exempt property. *Lockwood* v. *Exchange Bank*, 190 U. S. 294. It might be argued that by analogy the trustee should be denied the rights of the attaching creditors in the principal case, since he had no rights in the property as against the *bona fide* vendees. See Bankruptcy Act of 1898, § 67 f. It seems also a considerable hardship on the attaching creditors to be deprived of liens which they have not gained at the expense of the other creditors. The court appears justified, however, in disregarding the analogy and the hardship, because of the difference in the provisions of the Act as to exempt property and as to prior attachments. The former is excluded absolutely from its operation. See § 6; § 70 a. Prior attachments, on the contrary, unless ordered "preserved for the benefit of the estate," are dissolved by the adjudication. See § 67 f. Furthermore, the decision promotes the purpose of the Act in effecting a *pro rata* distribution of the debtor's property among all his creditors. The case is of particular interest as the first adjudication of the question under any federal act.

BILLS AND NOTES — CHECKS — TITLE. — The plaintiff gave his check, payable to "J. L. Baldwin," to Baldwin's agent in payment for horses, but in making the sale the agent led the plaintiff to believe that his principal was another person of the same name, a man of high business standing. The bank, having paid Baldwin's indorsee, was sued by the plaintiff. *Held*, that the plaintiff cannot recover. *Sherman* v. *Corn Exchange Bank*, 86 N. Y. Supp. 341.

In determining whether title to a check passes, which was the issue here, it is essential to find an intention of the maker to have it pass. The courts go far in finding this intention. They find it even when the one determined as payee presented himself to the drawer under the assumed name of the owner of the property for the payment of which the check was given. *Land Title and Trust Co.* v. *Northwestern National Bank*, 196 Pa. St. 230; *cf. Robertson* v. *Coleman*, 141 Mass. 231. But in the principal case the one determined to be payee, although the owner of the consideration, was not seen by the plaintiff. If the plaintiff had the wealthy "J. L. Baldwin" distinctly in mind when he wrote the check, the title could not have passed to the other "J. L. Baldwin." *Cundy* v. *Lindsay*, 3 App. Cas. 459: see 14 HARV. L. REV. 60. From the facts, however, it does not appear that the plaintiff had ever heard of either J. L. Baldwin before. It might well be said then that the plaintiff's definite intention was to make the owner of the horses the payee, the name being but a means of indicating that intention. *Cf. Samuel* v. *Cheney*, 135 Mass. 278.

CARRIERS — LIMITATION OF LIABILITY — INJURY TO GRATUITOUS PASSENGER. — A passenger, while riding on a free pass, was killed through the negligence of the railroad company's servants. In accepting the pass, he had agreed that the company should not be liable under any circumstances for his injury. *Held*, that the deceased's agreement is valid and a bar to an action by his representative for his wrongful death. *Northern Pacific Ry. Co.* v. *Adams*, 24 Sup. Ct. Rep. 408.

As to whether a common carrier can by contract limit its liability for negligence toward a gratuitous passenger the cases are in some conflict. *Kinney* v. *Central R. R. Co.*, 34 N. J. Law 513; *Gulf, etc., Ry. Co.* v. *McGown*, 65 Tex. 640. The view of the Supreme Court in passing on the point for the first time in the principal case seems the better one on authority, but is open to some objection. It is hard to distinguish such contracts from similar contracts with passengers paying consideration lower than the ordinary rate, which are generally held void as against public policy. *Railroad Company* v. *Lockwood*, 17 Wall. (U. S.) 357. The interest of the state in providing for the safety of its citizens in spite of themselves is as great in the one case as in the other. The two kinds of passengers have equal freedom of choice between paying full fare with protection in case of injury, and accepting a lesser liability with a lower fare. And the contention that in carrying gratuitously the carrier is not acting as, and hence is not subject to the burdens of, a public service company, is contrary to fact and to the decision of the Supreme Court. *Philadelphia, etc., R. R. Co.* v. *Derby*, 14 How. (U. S.) 468. As to whether such an agreement of the deceased, even if valid, is a bar to suit by his representative for his death, see 13 HARV. L. REV. 309; 14 *idem* 290.

CONFLICT OF LAWS — ENFORCEMENT OF FOREIGN CONTRACTS — PUBLIC POLICY OF FORUM. — The defendant, under duress of the plaintiff's threats to prosecute the defendant's husband for embezzlement in France, contracted in France to repay the embezzled money in consideration of forbearance to prosecute. The contract was valid and enforceable by French law. *Held*, that the English courts will not enforce it. *Kaufman* v. *Gerson*, 20 T. L. R. 277 (Eng., C. A.).

The court rested its refusal to enforce a contract obtained by duress on the ground that it belonged to the class of contracts "which in their nature are founded on moral turpitude." See STORY CONF. LAW, 7th ed., § 258. The phrase is an elastic one, expanding and contracting according to the ideas of the judges. Thus, in 1810, the Massachusetts court was ready to enforce a note given for slaves imported to South Carolina. *Greenwood* v. *Curtis*, 6 Mass. 358. The result would probably have been different in 1859, when the diversity between the law of the forum and the proper law would have depended on "an opposition of deep-seated moral ideas." See WESTL. CONFL. § 196. English and French ideas are hardly so opposed as to the moral turpitude of duress by threat. English contracts thereby obtained are good at law though voidable in equity or subject to an equitable defense. *McClatchie* v. *Haslam*, 63 L. T. (N. S.) 376. The present decision indicates that the English courts are ready to go as far as a recent North Carolina case refusing to enforce a contract good even in equity by the proper law of the contract, but unconscionable by the law of the forum. *Rowland* v. *Old Dominion Ass'n*, 115 N. C. 825.

CONSTITUTIONAL LAW — CLASS LEGISLATION — LEVY FOR COUNTY PURPOSES. — *Held*, that a statute authorizing commissioners to levy taxes for county purposes in a named county at a rate not to exceed a specified maximum contravenes the provision of the Ohio constitution that all laws of a general nature shall have a uniform operation throughout the state. *Pump* v. *Lucas County Com'rs*, 69 N. E. Rep. 666 (Oh.).

The decision goes upon the ground that any legislation setting a limit to the power of taxation is general in its nature. On the abstract proposition it is difficult to take issue with the court, although the result reached seems undesirable. It appears to be quite in line with other decisions of the same tribunal; for while the Supreme Court of Ohio recognizes the right of the legislature to create taxing districts and to levy special assessments on those who are specially benefited, it has condemned a statute which provided for the refunding of taxes paid upon exempt property and which was applicable to one county only. *Com'rs* v. *Rosche Bros.*, 50 Oh. St. 103; see *Hill* v. *Higdon*, 5 Oh. St. 243, 246. An enactment authorizing the building of highway bridges in a single county, and a statute appointing boards of equalization with greater powers in a specified county than in others were likewise held unconstitutional. *State* v. *Davis*, 55 Oh. St. 15; *Gaylord* v. *Hubbard*, 56 Oh. St. 25. Other jurisdictions with similar constitutional provisions have interpreted them so as to reach the opposite result. *Midland Elevator Co.* v. *Stewart*, 50 Kan. 378.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — TAXING PERSON NOT OWNER. — A state statute required proprietors of bonded warehouses to pay the taxes on liquors stored therein and gave them a lien on the liquors for the amount paid. *Held*, that the statute does not take property without due process of law. *Carstairs* v. *Cochran*, 24 Sup. Ct. Rep. 318.

A state statute imposed a privilege tax upon persons conducting the business of advertising in street cars, and made the street-car company which leased or sold the

privilege liable for the payment of the tax. *Held*, that the statute is unconstitutional, since it takes property without due process of law. *Knoxville Traction Co.* v. *McMillan*, 77 S. W. Rep. 665 (Tenn.). See NOTES, p. 484.

CONSTITUTIONAL LAW — ELEVENTH AMENDMENT. — A private individual, holding bonds of the state of North Carolina, donated them to the state of South Dakota, and the latter brought suit on them. *Held*, that the Supreme Court of the United States has jurisdiction. *State of South Dakota* v. *State of North Carolina*, 24 Sup. Ct. Rep. 269. See NOTES, p. 483.

CONSTITUTIONAL LAW — EMINENT DOMAIN — IRRIGATION DITCHES FOR PRIVATE USE. — The plaintiff, in order to obtain water for agricultural uses on his own farm, brought suit to condemn a right of way in a ditch running across the defendant's land, under a statute providing for the exercise of eminent domain in favor of persons desiring water for irrigation purposes. *Held*, that the way may be condemned. *Nash* v. *Clark*, 75 Pac. Rep. 371 (Utah).

It is universally held that private property can be taken under power of eminent domain only when the taking is for a public use. As to what uses are public the decisions differ. Some courts restrict the term to cases where the property taken is actually used by the public, or is under its control. *Varner* v. *Martin*, 21 W. Va. 534. By a broader view, however, a use is public when it results in a material advantage to the whole, or a considerable portion of the community. *Olmstead* v. *Camp*, 33 Conn. 532. This is the usual ground on which eminent domain proceedings in favor of milling and mining interests are supported. *Great Falls Manufacturing Co.* v. *Fernald*, 47 N. H. 444; *Dayton, etc., Co.* v. *Seawell*, 11 Nev. 394. The condemnation of the way in the principal case can be considered a taking for a public use, only because the public gets an indirect and doubtful advantage from the superior cultivation of the plaintiff's land. Such reasoning, however, has been expressly repudiated. *Scudder* v. *Trenton Falls Co.*, 1 N. J. Eq. 694. The result of the principal case, though extremely desirable in the arid sections of this country, would usually be thought to require a constitutional amendment.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — EXCLUSION OF ALIENS AS A JUDICIAL QUESTION. — The petitioners, Chinese persons, applied for admission to the United States, but were refused admission and detained by the immigration officers on the ground that they were not citizens of the United States and not within the classes entitled to admission. The petitioners refused to answer the questions asked by the officers or to appeal to the Secretary of Commerce and Labor, as allowed by the statute, but instead applied for discharge from custody on *habeas corpus*, alleging that they were citizens of the United States. *Held*, that the writ must be dismissed and the petitioners remanded. *In re Sing Tuck*, 126 Fed. Rep. 386 (Circ. Ct., N. D. N. Y.). See NOTES, p. 488.

CONSTITUTIONAL LAW — TAKING OF PROPERTY — RIPARIAN RIGHTS. — For the purpose of preventing further erosion at a point on the bank of the Mississippi River, the United States erected a revetment. As a result, the current was continued in its previous course and the land of the plaintiff on the opposite bank was gradually eroded. *Held*, that there is no taking of property for which compensation should be made. *Bedford* v. *United States*, 24 Sup. Ct. Rep. 238.

By the better rule, improvements in navigable streams which would constitute cause for action if made by private riparian owners are a taking of property when made by the state, and require compensation. *Thompson* v. *Androscoggin, etc., Co.*, 58 N. H. 108. Thus, there is a taking of property if lands are overflowed. *Pumpelly* v. *Green, etc., Co.*, 13 Wall. (U. S.) 166. The same is true when lands are damaged by the percolation of water through embankments which raise the level of the stream. *United States* v. *Lynah*, 188 U. S. 445. Since the protection of his bank is the right of the riparian owner, embankments erected for that purpose which deepen the channel and erode the opposite bank are not cause for action. *Barnes* v. *Marshall*, 68 Cal. 569; *Henry* v. *Vermont Central R. R.*, 30 Vt. 638. Similarly, the erosion resulting from the deepening of the present channel by embankments raised by the state is not a taking of property for which compensation must be made. *Alexander* v. *Milwaukee*, 16 Wis. 247; *Green* v. *Swift*, 47 Cal. 536. The present decision accords with the weight of authority and seems thoroughly sound in principle.

CONTEMPT — ACTS AND CONDUCT CONSTITUTING CONTEMPT — DISRESPECT OF COURT'S DECREE AGAINST ANOTHER. — An injunction was issued restraining certain persons, their agents, and all persons connected with them, from doing certain acts.

The defendant was not a party to the injunction proceedings nor was he served with the injunction. He was associated with the persons enjoined, however, and a member of the same labor union. He did the acts enjoined with knowledge of the injunction. *Held*, that the defendant is guilty of contempt of court. *People, ex rel. Stearns* v. *Marr*, 88 N. Y. App. Div. 422. See NOTES, p. 486.

CORPORATIONS — POWER TO ENTER INTO PARTNERSHIP — TRAFFIC AGREEMENT BETWEEN RAILROAD COMPANIES. — Two railroads were operated as parts of one system, the profits of all joint business being divided according to mileage. A passenger holding a ticket from a point on one road to a point on the other was killed on the line of the first company through the negligence of that company. His representative brought action against the second company. *Held*, that the agreement for division of profits is not *ultra vires* and that the second company is liable. *Lehigh Valley R. R. Co.* v. *Dupont*, 30 N. Y. L. J. 1925 (C. C. A., Second Circ.). See NOTES, p. 481.

DEEDS — EXCEPTIONS AND RESERVATIONS — TENANCY IN COMMON. — The grantor of a tract of land reserved to himself, his heirs, and assigns, the use and occupancy of any one of the coal banks on the land that he or his successors might at any time select. His successor sought in ejectment to establish his title to one of the banks of coal that were developed on the land. *Held*, that the plaintiff has no title to any of the coal. *Chapman* v. *Mill, etc., Co.*, 46 S. E. Rep. 262 (W. Va.).

This case repudiates the doctrine sometimes advanced that such an exception is not void, but makes the parties tenants in common, subject to a choice in partition according to the terms of the deed, as if one tenant in common gave the other by deed the power of partition. See *Smith* v. *Furbish*, 68 N. H. 123. Obviously any question as to partition is irrelevant unless the tenancy itself is possible. The fundamental requisite of tenancy in common is that the interest of each tenant be definable as a certain fractional part of the whole. See *Canning* v. *Pinkham*, 1 N. H. 353, 355; *Brownfield* v. *Johnson*, 128 Pa. St. 254, 267. Consequently, an exception of land for a street between termini not located is void. *Savill Brothers, Limited* v. *Bethell*, [1902] 2 Ch. 523. As the exception in the principal case was not of a fraction of all the coal, nor of one of many veins substantially alike, but of one of an unknown number of veins inevitably widely different in area, depth, and value, it is difficult to imply from the deed a tenancy in common. Consequently the reservation is void for indefiniteness.

FEDERAL COURTS — JURISDICTION — REMOVAL OF ACTIONS. — The plaintiff sued a foreign corporation in tort for negligence and joined two of its servants, citizens of his own state, as defendants. In consequence of the application of the doctrine of *res ipsa loquitur* to the corporation but not to its servants, the facts averred were sufficient to make out a case against the corporation only. The latter removed the cause from the state court to the federal circuit court. *Held*, that the federal court has jurisdiction. *Bryce* v. *Southern Ry. Co.*, 125 Fed. Rep. 958 (Circ. Ct., S. C.).

In order to give the federal court jurisdiction of a cause on grounds of diversity of citizenship, the state citizenship of all the parties plaintiff must ordinarily differ from that of all the parties defendant. If the cause of action is joint it is immaterial that the plaintiff's motive in joining a certain defendant was to prevent the federal court from acquiring jurisdiction, even although the defendants might have been sued separately, and might have separate defenses. *Chesapeake, etc., Ry. Co.* v. *Dixon*, 179 U. S. 131. The principal case illustrates an important limitation upon that rule, namely, that the jurisdiction of the federal court can be thus ousted only when the complaint discloses a sufficient cause of action against the nominal defendant joined. The authorities are not in entire agreement upon the precise question thus raised, but the decision of the court would seem to be entirely within the application of the recognized doctrine that if a complaint against joint defendants presents a separable controversy, either defendant otherwise entitled may have the suit as to him removed to the federal court. *Fergason* v. *Chicago, etc., Ry. Co.*, 63 Fed. Rep. 177; *Warax* v. *Cincinnati, etc., Ry. Co.*, 72 Fed. Rep. 637.

HIGHWAYS — ABUTTER'S RIGHT TO SHADE TREES. — The plaintiff sued the defendant for negligently destroying shade trees situated on a highway in front of the plaintiff's premises. The plaintiff owned no part of the highway and had not planted the trees. *Held*, that the plaintiff may recover. *Donahue* v. *Keystone Gas Co.*, 85 N. Y. Supp. 478.

This extends a previous New York case in which the plaintiff had planted the trees with the sanction of the municipal authorities. *Lane* v. *Lamke*, 53 N. Y. App. Div. 395. This, in turn, was an extension of the previously recognized rights of an abutter, the so-called easements of access, light, and air. *Lahr* v. *Metropolitan Elev.*

Ry. Co., 104 N. Y. 268. To provide these three to the abutter is part of the purpose of a highway. But shade trees would seem to be merely accidental embellishments, not within the principle. Nor has the plaintiff suffered the special damage necessary to an action arising from the violation of a public right which belongs to him only as a member of the municipality. For that damage must be of the kind recognized in other torts and suffered peculiarly by the plaintiff above the rest of the public as a result of the violation of some legal right besides the public right. See *Metzger* v. *Hochrein*, 107 Wis. 267. A familiar example is personal injury from obstructions in a highway. The destruction of property on adjoining land is not a recognized tort. It follows that the abutter is not injured by the destruction of shade trees unless he owns the soil. *Western Union Tel. Co.* v. *Krueger*, 64 N. E. Rep. 635 (Ind.).

HIGHWAYS — EXTENT OF PUBLIC EASEMENT — INTER-URBAN STREET RAILWAYS. — An inter-urban street railway passed over the city street on which the plaintiff's land abutted and in which he owned the fee. *Held*, that the running of inter-urban cars is an additional servitude on the plaintiff's land. *Younkin* v. *Milwaukee, etc., Co.*, 98 N. W. Rep. 215 (Wis.).

For a discussion of the principles involved see 17 HARV. L. REV. 66.

INJUNCTIONS — PREVENTION OF FRAUDULENT DEALING IN NON-TRANSFERABLE TICKETS. — *Held*, that railroads issuing and intending to issue non-transferable tickets for the round trip to the Louisiana Purchase Exposition are entitled to an injunction restraining ticket brokers from buying, selling, or dealing in the return coupons of such tickets. *Schubach* v. *McDonald*, 78 S. W. Rep. 1020 (Mo., Sup. Ct.).

The decision is contrary to the recent decision by the Supreme Court of New York in the case of *New York Central, etc., R. R. Co.* v. *Reeves*, 85 N. Y. Supp. 28, which was adversely commented upon in 17 HARV. L. REV. 202. The decision in the principal case appears to go even further in granting relief than was there requested, since the injunction here included tickets to be issued as well as those already issued.

INTERPLEADER — NECESSITY OF PRIVITY. — Commission merchants sold cattle for the ostensible owners. The fund realized was claimed by the latter and also by certain other parties claiming to have been the owners of the cattle by paramount title, as mortgagees. The commission merchants brought a bill of interpleader. *Held*, that the bill will lie. *Byers* v. *Samson-Thayer Commission Co.*, 19 Chic. L. J. 753 (Ill., App. Ct.). See NOTES, p. 489.

LEGACIES AND DEVISES — FORFEITURE ON CONDITION — HAPPENING OF CONDITION IN TESTATOR'S LIFETIME. — A will declared that certain benefits given to the testator's daughters should be forfeited if they married within a certain degree of kindred. Between the date of the will and the testator's death, a daughter married within that degree. *Held*, that the provision as to forfeiture applies only to marriages after the testator's death. *In re Chapman*, 116 L. T. 387 (Eng., C. A.).

In the endeavor to give effect to the testator's real intention, a different result has been reached in analogous cases. Thus on a bequest to A "until her marriage," or "so long as she continue single," marriage in the testator's lifetime works a forfeiture. *Bullock* v. *Bennett*, 7 De G. M. & G. 283; *West* v. *Kerr*, 6 Ir. Jur. 141. Similarly, on a devise to X until "he shall come into possession of the family property," if X comes into possession before the testator's death, there is a forfeiture. *Wynne* v. *Wynne*, 2 Keen 778. And on a devise to X until he become a bankrupt, an undischarged bankruptcy existing at the testator's death causes a forfeiture. *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1. In support of the principal case, it may be urged that the language of the will, speaking from the time of the testator's death, is prospective, and thus refers to conditions subsequent which have become impossible, and therefore cannot act to divest the estate. *Merriam* v. *Wolcott*, 61 How. Pr. (N. Y.) 377; *Peyton* v. *Bury*, 2 P. Wms. 626. On the whole the rule declaring the gift forfeited seems more in accord with the testator's intention, and that rule is supported by the weight of authority. *Phillips* v. *Ferguson*, 85 Va. 509.

LIENS — MONEY ADVANCED BY CARRIER FOR CUSTOMS DUTIES. — The plaintiff shipped goods in bond from Japan to St. Louis. The Canadian Pacific Railroad for its own convenience entered the goods without authority at St. Paul and paid the customs duties. The defendant, the terminal railroad, advanced such duties to the prior carriers, and claimed a lien on the goods for the advances. *Held*, that the lien exists under the federal statutes. *Wabash R. R. Co.* v. *Pearce*, 24 Sup. Ct. Rep. 231.

The statutes in question are the general provisions authorizing the inspection of

imports, the importation of goods under bond, and the assessment of duties. The lien here claimed is nowhere expressly mentioned. The Missouri court accordingly considered that no such lien existed. *State ex rel. Wabash R. R. Co.* v. *Bland*, 168 Mo. 1. The principal case however argues that since by general custom a carrier advances similar charges, such as freight due to prior carriers, and by common law is given a lien for such advances, these statutes impliedly grant a lien for import duties advanced. This view goes to the limit of judicial construction. In the absence of statute, the existence of the lien at common law is doubtful. On the one hand the import duty is a necessary expense of carriage naturally advanced by railroads to prevent delay. *Cf. Guesnard* v. *Louisville, etc., Ry. Co.*, 76 Ala. 453. On the other hand, the necessity of paying duties in St. Paul arose from the wrongful act of the prior carrier. *Cf. Pearce* v. *Wabash R. R. Co.*, 89 Mo. App. 437. The decision in the principal case secures a uniformity highly desirable.

MALICIOUS PROSECUTION — TERMINATION OF PREVIOUS PROCEEDINGS — SUFFICIENCY OF DISCHARGE FROM ARREST BY MAYOR. — A city charter gave the mayor discretion to discharge the defendants in actions for the violation of city ordinances. *Held*, that in an action for malicious prosecution by a person arrested on the defendant's complaint, such a discharge by the mayor is not a favorable termination of the criminal proceedings sufficient to sustain the action. *Tyler* v. *Smith*, 56 Atl. Rep. 683 (R. I.).

In an action for malicious prosecution a termination of the prosecution favorable to the plaintiff must be shown. The theory seems to be that it is against public policy, which encourages the apprehension of wrongdoers, that persons should be deterred from preferring charges through fear of exposure to groundless actions for malicious prosecution. What is a termination sufficient to sustain the action seems not to be settled by any rule of law. Certainly an acquittal on the merits is not essential. Thus it is enough to show a discharge on the entering of a *nolle prosequi*. *Douglas* v. *Allen*, 56 Oh. St. 156. In the principal case the prosecution was legally and finally terminated and there seems to be nothing in such a termination inconsistent with the right to maintain this action. Furthermore the consequence of this decision is that a discharge by the mayor is necessarily fatal to an action for malicious prosecution. The injury of which the plaintiff complains is, however, complete, and his remedy against the defendant therefor should not be thus defeated.

MANDAMUS — PHOTOGRAPHS OF CRIMINALS — SURRENDER AFTER ACQUITTAL IN NEW TRIAL. — A prisoner, after conviction for murder and during his confinement, was photographed and measured according to the Bertillon system for the identification of criminals. After a reversal of the judgment of conviction and his acquittal on a new trial, he applied for a writ of mandamus commanding the Superintendent of Prisons to remove the photographs and measurements from the records of his office. *Held*, that the writ will be denied. *In re Molineux*, 177 N. Y. 395.

For a discussion of the principles involved, see 17 HARV. L. REV. 142.

MASTER AND SERVANT — DUTY OF MASTER TO PROVIDE SAFE APPLIANCES — DOMESTIC SERVANTS. — The defendant engaged the plaintiff as a domestic servant, promising to provide board and lodgings. Owing to a leak in the roof, the plaintiff's bedroom became unfit for use. The plaintiff, relying on the defendant's promise to repair, remained, and became sick. *Held*, that the plaintiff may recover. *Collins* v. *Harrison*, 56 Atl. Rep. 678 (R. I.).

It is a well settled doctrine that a master must supply his servant with reasonably safe appliances, including premises. *Noyes* v. *Smith*, 28 Vt. 59; *Ryan* v. *Fowler*, 24 N. Y. 410. Nor does a servant, by remaining a reasonable time, assume the risk of known defects which the master has promised to repair. *Fitzgerald* v. *Connecticut River Paper Co.*, 155 Mass. 155. It is on this ground that the present decision must rest, since the action was not on the contract but in tort. It has been urged, however, that the rule was designed for the protection of factory employees working on relatively dangerous premises with machinery and materials of which they can have but little knowledge, and should not be extended to household servants who use only familiar implements. *Marsh* v. *Chickering*, 101 N. Y. 396; *Corcoran* v. *Milwaukee Gas Light Co.*, 81 Wis. 191. On theory this seems unsound, for while improbability of danger would undoubtedly decrease the care required of the master, it should not excuse from the duty to exercise care; and though familiarity with the tools increases the likelihood of a servant's assuming the risk, it does not follow that the servant always assumes it. Upon this reasoning the present decision seems theoretically sound, and is not greatly in advance of the weight of authority. *Mahoney* v. *Dove*, 155 Mass. 513.

MORTGAGES — EQUITABLE MORTGAGE — PRIORITY DETERMINED BY NOTICE. — A son created incumbrances upon such estate or interest as he should become entitled to at the death of his father. Soon after his father's death he became insolvent, and the various incumbrancers notified the administrator of their claims on his legacy. The question arose between these incumbrancers whether their priorities in this fund were to be determined by the date of their respective incumbrances or by priority of notice to the administrator. *Held*, that priority of notice governs. *In re Dallas*, 48 Sol. J. & R. 260 (Eng., C. A.).

The rule of the English courts that an assignee of an equitable interest in personalty who fails to give notice to the trustees is postponed to a subsequent assignee who in the exercise of due care has given such notice, has generally been applied to cases where the first assignee's failure to give notice has been the means of allowing the assignor fraudulently to create a subsequent incumbrance. *Dearle* v. *Hall*, 3 Russ. 48; *Lloyd's Bank* v. *Pearson*, [1901] 1 Ch. 865. Though possibly a strong factor in its introduction, the negligence of the first assignee cannot be regarded as the basis of the rule. Later decisions admit the difficulty of explaining the doctrine on any satisfactory principle, but accept it as a positive rule of law. *Ward* v. *Duncombe*, [1893] A. C. 369; *In re Wasdale*, [1899] 1 Ch. 163. In the principal case the failure of the first assignee to give notice was due to the fact that until letters of administration were granted there was no one to notify. It has been said that where notice is impossible the first incumbrancer is not prejudiced by failure to give notice. See *Feltham* v. *Clark*, 1 De G. & Sm. 307. Nevertheless, in view of decisions applying the rule to cases where the first assignee was in no way negligent, the court would seem justified in expressly repudiating the negligence theory, and in extending the doctrine to cover the present case. *In re Phillips' Trusts*, [1903] 1 Ch. 183.

MORTGAGES — ASSUMPTION OF MORTGAGE BARRED BY STATUTE OF LIMITATIONS. — The equity of redemption of mortgaged property was owned by several persons as tenants in common. After the mortgage lien had become barred by the statute of limitations, one of the tenants in common conveyed his interest in the property to the others by a deed by which the grantees agreed to assume the mortgage. In proceedings for partition the mortgagee claimed to have the mortgage satisfied out of the proceeds of the partition sale. *Held*, that the plaintiffs are estopped to show that the mortgage was not an enforceable incumbrance at the time of their contract. *Christian* v. *John*, 76 S. W. Rep. 906 (Tenn.).

The doctrine of the principal case is firmly established. The principle commonly laid down is that the parties to a deed and their privies are estopped to deny the distinct and material statements of fact therein. Thus the express assumption of the mortgage by the grantee of an equity of redemption is conclusive evidence even for the benefit of third persons of the existence and validity of the mortgage. *Alvord* v. *Spring Valley Gold Co.*, 106 Cal. 547. It is believed that on principle the estoppel in these cases should be treated as resting on contract. When the grantee, by the deed, assumes a specific mortgage, he has contracted to pay a debt. Any question as to the grantor's liability under the mortgage becomes thereafter immaterial and cannot be raised by the grantee. See 15 HARV. L. REV. 801. But under the circumstances existing in the principal case it seems probable that the defendant assumed to discharge merely whatever liability, if any, the grantor might be under. Such being the contract, he should be allowed to set up the statute of limitations or any other defense that would have availed the grantor for the purpose of negativing such liability.

MORTGAGES — VALIDITY OF CHATTEL MORTGAGE OF UNSPECIFIED GOODS. — *Held*, that a recorded mortgage of a specified number of cattle out of a larger number of the same description is good against a *bona fide* purchaser from the mortgagor. *Sparks* v. *Deposit Bank of Paris*, 78 S. W. Rep. 171 (Ky.).

In most jurisdictions, chattel mortgages, to be effective against third persons, must so describe the property as to enable such persons upon reasonable inquiry to identify it. *Parker* v. *Chase and Buck*, 62 Vt. 206. Mere statement of number, where the mortgagor owns a larger number, has been almost uniformly held insufficient. *Stonebraker* v. *Ford*, 81 Mo. 532. The present decision goes upon the ground that the mortgage gives the mortgagee a right of selection and that the record gives sufficient notice to put third parties upon inquiry. As the true object of requiring record appears to be to provide a substitute for delivery, it would seem that there ought to be at least an unequivocal identification. See *Bullock* v. *Williams*, 16 Pick. (Mass.) 33. Moreover, the doctrine of right of selection has been almost universally repudiated. *Richardson* v. *Alpena Lumber Co.*, 40 Mich. 203. Unless the articles are of uniform quality so that a theory of tenancy in common may be invoked, or unless the part

mortgaged is in some way appropriated, it is difficult to see how the court can avoid the well-settled rule that title to unidentified property cannot pass. See *Chapman* v. *Shepard*, 39 Conn. 413.

PAR DELICTUM — RECOVERY OF MONEY PAID UNDER ILLEGAL CONTRACT. — The plaintiff entered into an illegal insurance contract with the defendant, acting upon representations made by the defendant's agent that such insurance was valid. The agent made the representations in good faith, being mistaken as to the law governing such policies. *Held*, that the plaintiff cannot recover the premiums paid by him upon the policy. *Harse* v. *Pearl Life Assurance Co.*, 20 T. L. R. 264 (Eng., C. A.).

This decision of the Court of Appeal reverses the decision of the King's Bench Division, which was discussed in 17 HARV. L. REV. 62.

POWERS — ILLUSORY APPOINTMENTS. — The donee of a non-exclusive power appointed a merely nominal amount to some of the beneficiaries. *Held*, that the doctrine of illusory appointments will not be adopted to invalidate the execution of the power. *Hawthorn* v. *Ulrich*, 69 N. E. Rep. 885 (Ill.).

The English courts of chancery held that an appointment by the donee of a special non-exclusive power which cuts off one of the beneficiaries from any substantial share in the fund, is invalid. This doctrine of illusory appointments was found very unsatisfactory, however, and was finally abolished by statute in 1830. See 11 GEO. IV. & 1 WM. IV. c. 46. In this country the question has seldom been adjudicated. There are a few old decisions, however, repudiating the former English doctrine. *Cowles* v. *Brown*, 4 Call (Va.) 477; *Graeff* v. *DeTurk*, 44 Pa. St. 527. More modern *dicta*, on the other hand, have been tending to introduce the doctrine into this country. See *Thrasher* v. *Ballard*, 35 W. Va. 524, 529; *Degman* v. *Degman*, 98 Ky. 717, 722. The principal case, consequently, is of considerable interest as a strong decision in a court of last resort affirming the former American decisions and repudiating unequivocally the more recent *dicta* to the contrary.

PRESCRIPTION — ACQUISITION OF RIGHTS BETWEEN TENANTS OF SAME LANDLORD. — The defendant in an action of trespass claimed a right of way by prescription over the plaintiff's land. Both parties were tenants of the same landlord, and the defendant proved that he had used the way for more than forty years. *Held*, that the defendant has acquired no rights. *Kilgour* v. *Gaddes*, 116 L. T. 341 (Eng., C. A.). See NOTES, p. 487.

PROCESS — SERVICE UPON PERSON BROUGHT IN BY EXTRADITION PROCEEDINGS. — The defendant, a resident of Nebraska, having been brought into Iowa by extradition proceedings to answer to a criminal charge, gave bail for his appearance, and later returned for trial. After his acquittal, but before he had an opportunity to return home, he was served with civil process by the plaintiff. *Held*, that the defendant is privileged from such service. *Murray* v. *Wilcox*, 97 N. W. Rep. 1087 (Ia.).

Non-resident suitors, as well as non-resident witnesses, in attendance upon a trial in another state, are exempt from the service of civil process. *Matthews* v. *Tufts*, 87 N. Y. 568; *Fisk* v. *Westover*, 4 S. Dak. 233. Some courts refuse to extend this privilege to parties in criminal actions who have been brought into the state by extradition proceedings. *Williams* v. *Bacon*, 10 Wend. (N. Y.) 636; *Commonwealth* v. *Daniel*, 4 Clark (Pa.) 49. This class of cases does not seem to fall within the same rule of public policy that insures immunity to non-resident parties in civil actions, namely, that, in order to promote justice, suitors should be privileged to attend in other jurisdictions judicial proceedings in which they are concerned without incurring the risk of having other actions brought against them. The result reached in the principal case may, however, be supported on other grounds. In extradition proceedings jurisdiction over the individual is relinquished by one state and assumed by the other for the sole purpose of bringing about a prosecution for an alleged offense; to exercise the jurisdiction thus acquired for any other purpose would be a breach of faith on the part of the latter state. *Compton, Ault & Co.* v. *Wilder*, 40 Oh. St. 130.

PURCHASE FOR VALUE WITHOUT NOTICE — EXECUTION CREDITOR PURCHASING AT HIS OWN SALE. — The defendants attached certain land, and at the execution sale bought the land themselves. Prior to the attachment, the land had been conveyed to the plaintiff by an unrecorded deed. *Held*, that the defendant takes clear of the plaintiff's equity. *Sanger Bros.* v. *Collum*, 78 S. W. Rep. 401 (Tex., Civ. App.).

For a discussion of the question involved, see 17 HARV. L. REV. 63.

RAILROADS — RIGHT TO LIEN FOR DEMURRAGE. — The plaintiff allowed a car to remain unloaded for an unreasonable time after notification of its arrival. The

defendant claimed a lien on the goods for demurrage in accordance with its regulations. *Held*, that the lien exists. *Shumacher* v. *Chicago, etc., R. R. Co.*, 207 Ill. 199.

This decision affirms that in 108 Ill. App. 520, which was discussed in 17 HARV. L. REV. 284.

RECORDING AND REGISTRY LAWS — RECORD OF DEED OUTSIDE OF LINE OF TITLE. — *Held*, that a *bona fide* purchaser is bound to search the record for conveyances made by his grantor prior to the time when the grantor acquired legal title. *Bernardy* v. *Colonial, etc., Mortgage Co.*, 98 N. W. Rep. 166 (S. Dak.). See NOTES, p. 482.

RES JUDICATA — DEFENSE NOT RAISED IN FORMER SUIT. — The defendant filed a bill to cancel a mortgage on his land given to the plaintiff by the holder of the record title, on the ground that the plaintiff had notice that the defendant was the true owner. The suit ended in a judgment that the mortgage was valid. The plaintiff now files a bill to foreclose the mortgage, to which the defendant pleads as a partial defense that the loan secured was usurious. *Held*, that the validity of the plaintiff's lien is *res judicata* between the parties. *Belcher Land, etc., Co.* v. *Norris*, 78 S. W. Rep. 390 (Tex., Civ. App.).

The case comes within the rule that in a second suit involving the same cause of action, a plea of *res judicata* applies to every ground of recovery or defense which might have been presented and determined in the first suit. *Werlein* v. *New Orleans*, 177 U. S. 390. This is not strictly a doctrine of *res judicata*. The rule proceeds rather upon a policy which seeks to limit litigation, and is analogous to the rule that where several instalments have become due to the plaintiff, he must sue upon all of them in one action. *Beecher* v. *Conradt*, 13 N. Y. 108. The rule often works hardship, and in reality deprives a party of his cause of action. It might be urged, therefore, that on principle it should be confined to those cases where it would in fact lessen litigation. In the principal case the matter of the usury going only to the extent of the lien, it would seem that without increasing litigation it could be raised more properly under the bill to foreclose. However, the law is settled in accord with this decision. *Burnett* v. *Commonwealth*, 52 S. W. Rep. 965 (Ky.).

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST ACT. — A manufacturer of goods made a contract of sale with jobbers in another state into which the goods were to be shipped. The jobbers agreed that the goods thus purchased should not be sold or shipped outside the state in which they did business. *Held*, that this agreement is not in restraint of trade within the meaning of the Sherman Anti-Trust Act. *Phillips* v. *Iola Portland Cement Co.*, 125 Fed. Rep. 593 (C. C. A., Eighth Circ.). See NOTES, p. 480.

SLANDER — INSANITY AS DEFENSE — The defendant spoke words publicly charging the plaintiff with unchastity. The defense was that the words were uttered under an insane delusion that they were true. *Held*, that such insanity is a complete defense. *Irvine* v. *Gibson*, 77 S. W. Rep. 1106 (Ky.). See NOTES, p. 489.

SPECIFIC PERFORMANCE — CONCEALMENT BY VENDEE. — A corporation which was about to locate in a certain town employed a person living there to secure an option on the defendant's land. He did so without revealing to the defendant the facts within his knowledge, and then assigned the option to the corporation. *Held*, that the defendant cannot resist specific performance on the ground that he has been defrauded. *Standard Steel Car Co.* v. *Stamm*, 56 Atl. Rep. 954 (Pa.).

In general, when both vendor and vendee are in the business, dealing at arm's length, the vendee need not disclose his special information. Thus, specific performance was granted where the vendee knew of the vendor's ignorance of a rise in the value of the land, and where a debtor bargaining for a compromise knew that the creditor was unaware that a preliminary judgment in the suit had gone for him. *Dolman* v. *Nokes*, 22 Beav. 402; *Turner* v. *Green*, [1895] 2 Ch. 205. But whenever the vendor is not in the business, and special knowledge of a material fact has given the vendee an undue advantage, specific performance will be refused. Thus, where an expert buyer conceals from the seller, an ignorant farmer, the mineral value of his land, specific performance will not be granted. *Woollums* v. *Horsley*, 93 Ky. 582; *cf. Margraf* v. *Muir*, 57 N. Y. 155. But clearly, concealment by the vendee ought not to defeat specific performance, when, as in the principal case, the increase in the value of the land has been caused altogether by the vendee's pursuit of his own business.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

To the Editors of THE HARVARD LAW REVIEW:

In a very courteous note on my recent article, dealing with "*Rescission for Breach of Warranty*," you suggest that Professor Williston and I hold "different views as to the location of the boundary line on one side or the other of which a case is to be ranged"; adding, "Professor Williston finds the real distinction taken by the English law to be that between executed and executory contracts, no rescission being allowed in any case of an executed sale." Permit me to say that such is my understanding of the English rule, and of the rule generally prevailing in this country. My own statement upon this topic may be found in my text-book on Sales (2d ed.), at p. 140. I can discover nothing in my recent article at variance with that statement.

A little later in the note, you write: "In nearly all of the cases in dispute the engagement fell within one of these classes, and after acceptance of the title, rescission was allowed upon discovery of the defect"; citing as the first case in support of this statement *Polhemus* v. *Heiman*, 45 Cal. 573. I fancy the citation is due to a slip of the pen, for, in *Polhemus* v. *Heiman*, rescission was neither allowed nor sought.

I quite agree with you that "there can be no ground for contention that the property had not passed in a case where the guano purchased had been put into the soil by the buyer, as in *Pacific, etc., Co.* v. *Mullen*, 66 Ala. 582." I think, too, that you will agree with me that such use of the guano put an end to the buyer's right of rescission under the Massachusetts rule. After intentionally putting the guano into the soil, he was no longer in a position to "rescind the contract for breach of warranty by a seasonable return of the property." See *Bryant* v. *Isburgh*, 13 Gray (Mass.) 607. Professor Williston's Draft of Code, § 54 (3). Indeed, *Pacific, etc., Co.* v. *Mullen* would have been decided in England precisely as it was decided in Alabama. It applies the principle which was applied in the same way in *Poulton* v. *Lattimore*, 9 B. & C. 259, and which is incorporated in the English Sale of Goods Act, § 53 (1) (a). This Alabama case is not open even to a suspicion of following the Massachusetts rule instead of the English law.

Very respectfully,

FRANCIS M. BURDICK.

The criticism to which Professor Burdick takes exception in this very friendly manner was aimed at showing unfounded what was understood to be his view of the English rule, viz. — that under it rescission is allowed, even after the passage of title, for the breach of an implied warranty or condition, such, for example, as the implied engagement, that goods sold by description shall correspond with the description, or that goods sold for a particular purpose known to the seller shall be reasonably fit for that purpose. This understanding was based on the following passage, among others, in his article: "the question in dispute is not whether the purchaser can rescind for the breach of any sort of warranty; but whether he can rescind for the breach of a collateral or subsidiary warranty. In England, as in Massachusetts, the purchaser is entitled to rescind the contract for the breach of" an implied warranty, or condition. 4 Columbia L. Rev. 2. If the only dispute between the jurisdictions is as to the case of a collateral warranty, then they must be in accord as to the remedy for the breach of an implied warranty, or condition, in all cases, including those where the sale is executed; and it will hardly be denied that Massachusetts

courts allow rescission after the passage of title as freely for the breach of an implied as of a collateral warranty.

Again, in order to show that cases allowing rescission cited by Professor Williston as supporting the Massachusetts rule and opposed to the English rule would have been similarly decided in England, Professor Burdick was contented in his article merely to point out that the warranties were conditions under the Sale of Goods Act, or "vital, not subsidiary promises." 4 Columbia L. Rev. 6, 7, notes 3 and 5. But if before the passage of title rescission is allowed for breach of a collateral warranty as well as for breach of a condition, as Professor Burdick impliedly asserts on page 5; and if the breach of a condition does not necessarily operate to prevent the vesting of title, a suggestion which he expressly repudiates in 4 Columbia L. Rev. 265, then it is hard to see the sufficiency, or even the pertinence, of the distinction unless on the basis that the breach of a condition makes rescission allowable even after passage of title.

But it appears from the above communication, and indeed it is specifically stated in a second and more recent article by Professor Burdick in 4 Columbia L. Rev. 265, replying to an answer to his first paper published by Professor Williston in 4 Columbia L. Rev. 195, that Professor Burdick agrees that the issue is "whether rescission of an executed sale is allowable for breach of a promise, whether collateral, part of the description, or wholly implied."

The question in regard to the cases in dispute seems to have become now merely whether in those cases title had been finally accepted at the time when rescission was sought, or whether possession had been taken merely for examination. The individual cases have been carefully analyzed in this regard by Professor Williston and Professor Burdick in the March and April numbers respectively of the Columbia Law Review, to which the reader is referred.

Professor Burdick's protest against the citation of cases in the previous note in this Review deserves attention, though collateral to the main issue. It must be admitted that *Polhemus* v. *Heiman* stands for rescission only by a *dictum*. *Pacific, etc., Co.* v. *Mullen* was cited as a case where it was indubitable that title had passed, and yet rescission was allowed. The plaintiff was not permitted to recover in an action brought for the price of the goods. It is true that the same result would have been reached in England on the basis of recoupment, the guano being worthless; but the court places its decision on the ground of rescission, not of recoupment. The requirement that the goods be returned as a condition precedent to the right of rescission is probably in Massachusetts as elsewhere where rescission is allowed subject to an exception when the goods are valueless. See *Perley* v. *Balch*, 23 Pick. Mass. 283, 286. The case, therefore, would have been similarly decided in Massachusetts on the same reasoning, whereas the result would not have been reached in England except on totally different grounds.

DEGREE OF CARE TO BE EXERCISED BY A GRATUITOUS BAILEE. — The nature and extent of a bailee's liability in gratuitous bailments is not fully explained by the text writers nor clearly set forth in the cases. On the one hand, there is the rule, at least nominally established, that a gratuitous bailee is liable only for gross negligence, the application of which is discussed to a very limited extent in a recent article. *Degree of Care to be Exercised by a Gratuitous Bailee*, Anon., 58 Central L. J. 181 (Mar. 4, 1904). On the other hand, it has been forcefully contended that a gratuitous bailee is held to such a degree of care and exertion in the business as he in fact undertook to bestow. See 5 HARV. L. REV. 222.

It must be admitted at the outset that the rule first stated is in itself no test of a bailee's liability. Negligence is a breach of some duty. The duty which the gratuitous bailee owes to his bailor arises, not from any contractual relation between the parties nor from their relation as members of society, but solely from the new relation in which they have been placed by the voluntary under-

taking of the bailee. *Cf.* 17 HARV. L. REV. 126. Although it is clear that the undertaking primarily gives rise to the duty, a more uncertain phase of the question is encountered in considering whether the extent of that duty is to be determined likewise from the undertaking itself, or by certain established rules of law. Whenever an explicit understanding exists between the parties, the extent of the bailee's liability may indeed be determined from his undertaking, but in the absence of any such understanding it is hard to believe that he does in fact undertake to bestow any particular degree of care. Even a mutual understanding, if it be to the effect that the bailee shall not be liable for negligence, would not excuse him from the exercise of proper care. *Lancaster Co. Nat'l Bank* v. *Smith*, 62 Pa. St. 47. Furthermore, where both parties mistakenly believe that the liability of the bailee is absolute, it can scarcely be contended that he ought thereby to be placed in the position of an insurer. It would seem, therefore, that, in order to determine the extent of a bailee's liability in certain cases, one must go beyond the actual undertaking and consider what care the law requires of him in performing the duty which he has undertaken. This depends upon the nature of the bailment. In case of a loan for the benefit of the bailee great care is required, in case of a bailment for hire for the benefit of both parties ordinary care is required, and in case of a deposit for the benefit of the bailor slight care is required. It may be said that these three degrees of care in ordinary bailments, having become crystallized into rules of law in much the same way that the absolute liability of the common carrier has become established, determine the extent of the bailee's liability in all cases in which it either cannot or ought not to be determined from the actual undertaking.

Although the courts still continue to speak of the gratuitous bailee as being liable only for gross negligence, gross negligence seems to mean nothing more nor less than ordinary negligence. Various judges have in fact protested against the use of the term "gross" in this connection. See Baron Rolfe in *Wilson* v. *Brett*, 11 M. & W. 113. In whatever way the extent of the gratuitous bailee's duty may be determined, it must be clear that he is liable for any negligence arising from a failure to properly perform that duty.

ASSIGNMENT OF LIFE INSURANCE POLICY TO ONE WITHOUT INSURABLE INTEREST. — It is well settled in life insurance law that a policy issued to one who has no insurable interest in the life insured is void as a wagering contract. An early English case, proceeding upon the theory that life insurance is a contract of indemnity like property insurance, required an insurable interest at the time of loss. *Godsall* v. *Boldero*, 9 East 71. But this theory was repudiated in a later case where a creditor's interest ceased before the death of the debtor whom he had insured. *Dalby* v. *India, etc., Co.*, 15 C. B. 365. See also *Connecticut, etc., Co.* v. *Schæfer*, 94 U. S. 457. On the further question whether a valid policy may be assigned to one who has no insurable interest, there has been more dispute, but the tendency seems to be to hold such an assignment valid. *Mutual, etc., Co.* v. *Allen*, 138 Mass 24. The authorities are collected in a recent article. *Validity of Assignments of Life Insurance Policies to Persons Having no Insurable Interest in the Life of the Insured*, by J. T. Ford, 58 Central L. J. 184 (Mar. 4, 1904).

The argument of the minority is, in brief, that an assignment to one without interest is simply an indirect means of getting a wagering contract and of giving to the assignee an interest in the death rather than in the life of the insured, — objects which the law considers against public policy when attempted directly. On the other hand it is argued that what public policy forbids is the obtaining of insurance on a life by a stranger, as distinguished from either the naming of a stranger as a beneficiary or the assignment by the insured of a policy to a stranger, in which case a man voluntarily gives to another an interest in his decease.

It would seem that the courts which have denied the validity of such assignments have been led to that result by considering cases which did not necessarily

raise the question, namely, cases of assignments by debtors to their creditors. In such cases courts were quite naturally willing to find that the assignment was for collateral security and to let the assignee keep the proceeds only to the extent of his interest. But from this implication of fact it proved an easy step to a hard and fast rule of law that in every such case the assignee can recover only his debt and disbursements, and that the "policy of the law forbids" any further enforcement of the assignment. *Lewy & Co.* v. *Gilliard*, 76 Tex. 400; *Warnock* v. *Davis*, 104 U. S. 775. Obviously this reasoning, sound in origin as to collateral security, does not apply either where the interest is not directly pecuniary or where the assignee has no interest at all; and yet the results of the creditor cases together with loose *dicta* in them have largely influenced, it is believed, those decisions which hold that an assignee must have an insurable interest. The attitude, consequently, in determining how far these assignments are good, has been how far they are supported by an insurable interest, and not the normal attitude now prevailing, how far this is different from any assignment of a chose n action and what public policy forbids it. The arguments of the cases *pro* and *con* are collected in the article cited.

AMERICAN LAW SCHOOLS AND THE TEACHING OF THE LAW. *George L. Reinhard.* 16 Green Bag 165.

ANCIENT MODES OF DETERMINING GUILT OR INNOCENCE. *Joseph M. Sullivan.* 21 Lancaster L. Rev. 127.

APPOINTMENT OR ELECTION OF OFFICERS AND CONFIRMATION OF NOMINATIONS BY COUNCIL OR GOVERNING LEGISLATIVE BODY. *Eugene McQuillen.* A somewhat comprehensive article with good citation of authority. 58 Central L. J. 163.

CHANGED CONDITIONS IN THE PRACTICE OF THE LAW. *Edward P. White.* 12 Am. Lawyer 52.

COMPENSATION IN CRIMINAL CASES. PART I. *Anon.* Discussing the provisions of the Indian Criminal Procedure Code for compensation to an acquitted defendant. 1 Crim. L. J. of India 1.

DEGREE OF CARE TO BE EXERCISED BY A GRATUITOUS BAILEE. *Anon.* 58 Central L. J. 181. See *supra.*

DOES THE INDISCRIMINATE SALE OF THE SCORE AND LIBRETTO OF A FOREIGN OPERA IN WHICH THE COMPOSER RESERVES TO HIMSELF ALL RIGHTS OF CONCERT REPRODUCTION HAVE THE EFFECT OF DEDICATING IT TO THE PUBLIC? *Anon.* Discussing briefly *Wagner* v. *Conreid*, 125 Fed. Rep. 798. 58 Central L. J. 221.

ENTRAPMENT OR DECOY SOLICITATION AS A DEFENSE TO CRIMINAL PROSECUTION. *Glenda Burke Slaymaker.* 58 Central L. J. 206.

EVOLUTION OF THE FOURTEENTH AMENDMENT. *Louis F. Garrod.* 12 Am. Lawyer 65.

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HEARING CASES IN CAMERA. *Anon.* A plea for private hearings of objectionable suits and indictments. 68 Justice of P. 111.

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INTERNATIONAL ASPECTS OF THE RUSSO-JAPANESE WAR. *T. Baty.* 116 L. T. 358, 381.

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IS THE INITIATIVE AND REFERENDUM REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES? *Willis L. Hand.* 58 Central L. J. 244.

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LAW'S DELAYS AND THEIR ONLY REMEDY. *William Henry Knox.* Suggesting the election of more judges. 66 Albany L. J. 73.

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LIABILITY OF MUNICIPALITY FOR FAILURE OF ITS OFFICERS TO ENFORCE ORDINANCES. *Anon.* 58 Central L. J. 160.

LIMITATION OF THE RULE REQUIRING TRAVELLERS AND OTHERS TO STOP, LOOK, AND LISTEN BEFORE ATTEMPTING TO CROSS RAILROAD TRACKS AS SOUGHT TO BE APPLIED TO URBAN STREET RAILWAYS. *Blackburne Esterline.* 58 Central L. J. 222.

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ONE OF THE LAW'S INIQUITIES. *H. N. G.* Commenting upon the rule that a mistake of law is no excuse in bigamy cases. 7 Law Notes (N. Y.) 226.

OUR RIGHTS IN HUDSON'S BAY. *W. E. O'Brien.* Discussing the rights of a sovereign over bays more than two leagues wide at the entrance. 40 Can. L. J. 132.

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TENANT'S LIABILITY FOR IMPROVEMENT CHARGES. *Anon.* Discussing construction put by English courts upon lessee's covenant to pay charges imposed upon the premises for improvements. 23 Law Notes (Eng.) 79.

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THE EXPANSION OF THE COMMON LAW. PART IV. *Sir Frederick Pollock.* 4 Columbia L. Rev. 171.

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THE NORTHERN SECURITIES CASE. *Anon.* 58 Central L. J. 241.

TRADE UNIONS AND BREACHES OF CONTRACT. *Anon.* 40 Can. L. J. 178.

UNREASONABLE BY-LAWS. *Anon.* Discussing the rules of construction of by-laws. 68 Justice of P. 98.

VALIDITY OF ASSIGNMENTS OF LIFE INSURANCE POLICIES TO PERSONS HAVING NO INSURABLE INTEREST IN THE LIFE OF THE INSURED. *James T. Ford.* 58 Central L. J. 184. See *supra.*

WHAT THE UNITED STATES HAS DONE FOR INTERNATIONAL ARBITRATION. *John W. Foster.* 16 Green Bag 153.

II. BOOK REVIEWS.

THE PRINCIPLES OF ADMINISTRATIVE LAW governing the relations of public officers. By Bruce Wyman. St. Paul, Minn.: Keefe-Davidson Company. 1903. pp. x, 641. 8vo.

There may be said to be three fundamental canons of successful law-book making: a subject wisely chosen in a field where new work is needed; then clear, accurate, and logical analysis, exposition, and argument of that subject; and finally the whole matter set forth in good, forceful English, and molded into such a form as will make its meaning readily apparent and its material easily accessible. The present volume, which is based upon an occasional course of lectures delivered in the last few years by its author in the Harvard Law School, to a considerable degree meets the requirements of two of these canons.

Though *Le Droit Administratif* constitutes a most important topic in all continental systems of jurisprudence, it has never played a part of any special importance in our law. There is no place in the domain of the common law for a separate independent system governing the relations of public officers either among themselves or to the public. However, where the common law principles have touched upon the rights and duties of administrative officers, there have arisen certain important rules, which coupled with principles purely administrative in their nature have given rise to a branch of law of considerable and growing importance. This topic has never received adequate treatment from text-writers. A treatise therefore dealing in an elementary way with the main principles of this subject, which is all that the present volume attempts to do, should be of considerable practical value. It should also exercise not a little influence upon the future development of administrative law.

The writer has analyzed his subject with considerable care, approaching it from many different points of view. After a brief introductory chapter, he treats in general outline the relation of the administration to the individual citizen and to the other branches of the government. He then takes up the rights, powers, and duties of the administration, its character, the scope and effect of its methods of performing its work, and finally the extent and limits of its jurisdiction. The general principles are stated carefully and accurately and the whole subject covered in a concise but interesting manner. Decisions and other authorities are extensively quoted, and a valuable collection of cases is to be found in the notes.

The third requisite of the successful law book, however, the author has not kept carefully before him. The English of this book is often careless and crude. The sentences are frequently disjointed and sometimes unwieldy. The punctuation, moreover, is often inadequate. Not a quotation mark is used throughout the work, although extracts from decisions and other authorities are most numerous. As a result of this latter defect, it is often impossible to separate the language of the quotation from the author's own discussion. This leads to confusion and is likely to be the source of mistakes and the cause of embarrassment. The topics printed as the subjects of the paragraphs are too concise and disconnected to furnish any clear analysis of the chapters or to serve as real guides to the discussions which they are intended to cover.

The subject matter of these lectures is unquestionably an addition of considerable merit to legal scholarship. The book should thus prove a helpful manual to public officers and to all concerned with the legal problems growing out of their relations with public officers. It is therefore to be hoped that the work will soon deserve a second edition so that the author may correct the defects which mar it in its present form.

An extensive appendix collecting various statutes, regulations, and rules governing administrative practice before the chief federal executive departments adds to the practical usefulness of the book. W. H. H.

THE CODE OF HAMMURABI, KING OF BABYLON. About 2250 B.C. Autographed text transliteration, translation, glossary, index of subjects; lists of proper names, signs, numerals, corrections and erasures; with map frontispiece and photograph of text. By Robert Francis Harper, Professor of Semitic Languages in the University of Chicago. Chicago: The University of Chicago Press. London: Luzac & Company. 1904. pp. xv, 192. 102 plates. 8vo.

A little over two years ago there was discovered upon the old Persepolis at Susa, by an expedition sent out by the French Government, a block of black diorite, nearly eight feet high, upon which was engraved a Code of Laws supposed to have been given to King Hammurabi by the Sun-God. When we reflect that this Hammurabi is identified with the Amraphel of the Bible — conquered by Abraham about 2250 B. C. — whose rule extended over the whole of Mesopotamia, from the mouths of the Tigris and the Euphrates to the shores of the Mediterranean, we are forced to agree with Mr. Johns, who has stated that these laws constitute one of the most important monuments in the history of the human race.

As to the accuracy of the translation and transliteration we are forced to take Mr. Harper at his word. If we attempt to compare his work with that of Mr. Johns, or Father Scheil, or Müller, or Kohler-Peiser, we are no better off, for we have no means of deciding as to their differences. This work will have to be performed by the Assyriologists. But it may not be amiss to throw out a caution against relying too seriously upon the perfect accuracy of the translations from the "tongue of the Sun-God," especially when we remember the impossibility that was found to exist in accurately setting into English, a kindred language, the work of the recent German codifiers. It may be permitted, however, to take a general view of this Code.

It has been said by Professor Maitland that while this may be the "Oldest Code of Laws in the World," it is very far from being the most archaic. It may come to us from the third millennium B. C., but we find ourselves doubting whether our English ancestors at the end of the first millennium A. D. were not in many important respects behind the worshippers of the Sun-God. Naturally we find the idea of retaliation very prominent: punishment in criminal and in many civil cases is based upon the principle of "an eye for an eye and a tooth for a tooth."

The doctrine of negligence, however, plays a larger part in the laws of Hammurabi than in many later Codes. "If a shepherd be careless and he bring about an accident in the fold, . . . the shepherd shall make good in cattle and sheep." § 267. But "If a visitation of God happens to a fold, or a lion kill, . . . the owner of the flock shall suffer the damage." § 266. In §§ 251 and 252 we find a general statement of our modern doctrine of *scienter* as applied to owners of animals. We also discover the existence of "deeds," and of certain contracts requiring more formal expression than others. In § 50 it is written that an owner of a field which is given (in security) to a merchant, shall receive the grain and pay to the merchant only the loan and interests. One of the most noteworthy features of this Code is the slight importance given to the formal exculpatory oath, which has played such an important part in other laws. When we find it written that "the witnesses shall give their testimony in the presence of God" and that "the judges shall consider their evidence," we are forced to recognize that the ancient Babylonians had made great advances in jurisprudence.

The title-page sufficiently indicates the contents of this book. Much labor has been expended upon its mechanical production, and the result has been to give to the public in attractive form a work replete with interest, though of slight practical importance.

IMPERATORIS IUSTINIANI INSTITUTIONUM, LIBRI QUATTUOR, with Introduction, Commentary, and *Excursus*. By J. B. Moyle. Fourth Edition. Oxford: The Clarendon Press. London: Stevens & Sons, Ltd. 1903. pp. vii, 680. 8vo.

In 1883 Mr. Moyle published, in two volumes, the first edition of his work on the Institutes of Justinian. The first volume contained an introduction, the text of the Institutes with a commentary, and ten *excursus*: the second contained the translation. While these two volumes formed one complete work, Mr. Moyle has re-edited them at different times. The translation is still in its third edition, while the other volume now appears in a fourth.

It is difficult to speak with moderation of the work which Mr. Moyle has accomplished in this field. While the present volume purports to be merely a commentary on the Institutes, it contains, in reality, information upon most questions arising in regard to the law of Rome from the days of the Twelve Tables down to the time when Justinian, through the labors of Tribonian and his associates, codified the writings of the authorized jurists and the imperial legislation, and gave a new form to the Civil Law.

The Introduction to the present volume, covering eighty-three pages, contains a critical and scholarly account of the history of Roman Law and Legislation. Since the treatment is condensed in space, the style is necessarily concise. The author presumes in his reader a general familiarity with Roman history and conditions, and without these it would be difficult to follow the discussion to advantage. The most interesting portions of the article are those treating of the relation of public and private law, the original position of the *plebs*, and the origin of the *jus gentium* and its connection with the edicts of the prætors. A regret may, however, be expressed that Mr. Moyle has not given us his personal opinion upon a famous distinction of the Roman law — that of *res mancipi* and *res nec mancipi*, instead of collecting the opinions of other writers. In this edition the author has added to the Introduction an account of the influence exercised upon the development of law by the pontifical and lay lawyers of the Republic.

In an introduction to each Book the author explains the scope and the sources of the principal portion of the text. The notes in this edition have been carefully revised and cover more space than the text itself.

The ten *excursus*, covering nearly a hundred pages, form one of the most valuable and scholarly portions of the book. Of these the most noteworthy are the fifth, dealing with the general nature of obligations; the seventh, upon joint and several liability; the eighth, upon the Roman literal contract and its history; and the tenth, covering forty pages, which discusses the early history of Roman Civil Procedure.

A general index and an index to the text make it possible for any person desiring information upon any special point within the scope of the work to find it at a moment's notice.

THE MIRROUR OF JUSTICES, written originally in the old French, before the Conquest. By Andrew Horn. Translated by W. H. of Gray's Inn. Introduction by William C. Robinson. Washington, D. C.: John Byrne & Co. 1903. pp. xix, 337. 8vo.

The tendency of nearly all authorities is to ascribe the authorship, or at least the compilation, of the Mirrour of Justices to Andrew Horn, author of the Liber Horn, who died a distinguished citizen of London in 1328. The stated purpose of the book is to set forth the true doctrines of the Common Law in order that the Justices may see and correct the daily abuses into which they have fallen. In accordance with this purpose, the text falls roughly into three divisions: first, a brief classification and history of the law; second (composing the bulk of the volume), the rules of law as the author conceives them to exist; third, a statement of one hundred and fifty-five abuses of the law, together with a criticism of the provisions or the administration of several of the cele-

brated ancient statutes. Such being the character of the book, it is a matter of regret that it seems impossible to consider it wholly trustworthy. It is true that as early as 1550 it was cited as authority, *Reniger* v. *Fogossa*, 1 Plowd. 1; and Lord Chief Justice Tindal classed it with Bracton as evidence of the ancient law. *In re Serjeants at Law*, 6 Bing. N. C. 187. But the writers of historical treatises have not placed so much confidence in it. Reeve is inclined to regard the book as a curiosity rather than an authority. 2 REEVE, ENGLISH LAW 232. Pollock and Maitland's History of the English Law (Vol. 2, p. 478 n.) dismisses it as "so full of fables and falsehoods that as an authority it is worthless." Moreover, this is but the beginning of the controversy, for its date, its true purpose, and its origin have all been questioned. It has been held to contain ancient matter antedating the Conquest; it has been strongly hinted that it was a deliberate misrepresentation. Indeed it may almost be said that there is no point concerning it not open to dispute.

Besides the text, the present volume contains a short, but satisfactory introduction, defining the positions of the contending commentators, and briefly discussing the whole controversy. With this as a guide, the reader fond of historical legal research will find the pages of interest.

STREET RAILWAY REPORTS, reporting the electric railway and street railway decisions of the Federal and State courts in the United States. Edited by Frank B. Gilbert. Vol. I. Albany, N. Y.: Matthew Bender. 1904. pp. xvi, 943. 8vo.

The introduction of electricity as a motive power has revolutionized the use of streets and highways for transportation purposes. This development has been marvelously rapid and ever increasing. Hardly less rapid has been the growth of a well-defined street railway law. While the cases on this subject have been hidden away in a maze of reports, among a multitude of other decisions, it has been very difficult for a lawyer to keep pace with the development of this practical and interesting branch of the law. Recognizing this situation, the publishers of the present volume have felt that the demands of the legal profession would justify the production of a series of reports devoted exclusively to street railway decisions. The accuracy of this estimate must be left to the future to decide. The same idea was put into operation twice before, in 1864 and 1894, and proved unsuccessful in both instances. Ten years ago, however, this branch of the law was but in its childhood, and we cannot but feel that the judgment of the publishers in this instance has been well founded.

This volume, the first of the series, covers the cases decided in the Federal and State courts from April 1, 1903, to the date of publication. Roughly speaking, there are one hundred and sixty decisions reported, covering all topics bearing directly upon street railways. The notes are numerous, and sometimes exhaustive and thorough. The binding and presswork are excellent. The indexes, to both decisions and notes, are in convenient form. Altogether the work of the editor has been satisfactory, and it is sincerely to be hoped that the subsequent volumes will attain the same standard.

AN INTRODUCTION TO PRACTICE, with Special Reference to the New York Code of Civil Procedure. By George A. Miller. New York: Leslie J. Tompkins. 1903. pp. xiv, 284. 8vo.

In the preface to this noteworthy addition to treatises on New York practice, Mr. Miller says: "The Code was not written for students. Its authors assumed the existence of a profession having knowledge of an existing system of practice in which statutory changes were to be made. For students, the Code is simply a collection of obscurities arranged in confusion. To them, as a subject of study, it is hopeless. To wander in its wilderness without a guide is to get lost.

Yet the writer believes that it is practicable, by efforts within ordinary abilities, properly assisted, to acquire a fair working knowledge of Code practice."

The work accordingly presents a logical arrangement of the subjects of which the Code treats, the many provisions upon one subject being collected from the various portions of the Code's tortuous length. Obscurities are made clear by explanations based upon the general rules of practice and the decisions of the courts. Beginning with the methods of commencing an action, the book considers the pleadings, the trial, the judgment, the parties to actions, incidental practice, evidence in its relation to procedure, provisional remedies, the so-called state-writs, and finally certain actions about which there are special regulations. Mr. Miller has put his material into such readable form that the book is a very interesting one. It is particularly valuable for preparation for bar examinations.

THE TRUTH ABOUT THE TRUSTS. A Description and Analysis of the American Trust Movement. By John Moody. New York: Moody Publishing Company. 1904. pp. 514. 8vo.

For readers seeking information regarding the investment standing of the industrial trusts, the present book, compiled from investors' journals, corporation manuals, and general periodicals, will prove valuable. It tells, by quotations from balance-sheets, prospectuses, and newspapers, the history and the present standing of seven of the chief trusts and eighty lesser trusts. It comprises accounts of present — though possibly ephemeral — interest regarding the industrial trusts in process of reorganization, and articles on the great railroad and public service systems. Accompanying these articles are several charts, and chapters upon particular phases of the trust problem. The charts which purport to trace the division of the industrial field between the Rockefeller and the Morgan interests, like most graphic explanations of hazy facts, are exaggerations, and do little more than reflect the newspaper gossip of the moment. The chapters on The Dominating Influences of the Trusts and The Chief Characteristics of the Trusts are cursory. The book commends itself by its elaborate statistics rather than by its discussion of the trust movement.

THE LIFE OF JOHN MARSHALL. By Henry Flanders. Philadelphia: T. & J. W. Johnson & Co. 1904. pp. x, 278. 8vo.

This is a republication in separate form of a life of Marshall which first appeared in the author's "Lives and Times of the Chief Justices," published in 1875. As that biography has persisted as a comprehensive and sympathetic handling of its great subject, the publishers are justified in making it more easily available. It is not so simply and beautifully told, perhaps, as the little biography by the late Professor Thayer, and one misses the discriminating treatment by his masterly hand of the position of the Chief Justice in constitutional law, but it contains a more minute account of Marshall's career, with numerous quotations from his speeches and opinions, and much of peculiar interest about his private life and character. As a frontispiece there is a reproduction in photogravure of the famous Inman portrait. Books of this sort give refreshing glimpses at the human side of the finding of the law by the courts.

THE CODE OF HAMMURABI, KING OF BABYLON. About 2250 B. C. Autographed text transliteration, translation, glossary, index of subjects; lists of proper names, signs, numerals, corrections and erasures, with map, frontispiece, and photograph of text. By Robert Francis Harper, Professor of Semitic Languages in the University of Chicago. Chicago: The University of Chicago Press. London: Luzac & Company. 1904. pp. xv, 192. 102 plates. 8vo.

A TREATISE ON SPECIAL SUBJECTS OF THE LAW OF REAL PROPERTY. Containing an outline of all Real-Property Law and more elaborate treatment of the subjects of Fixtures, Incorporeal Hereditaments, Tenures and Alodial Holdings, Uses, Trusts and Powers, Qualified Estates, Mortgages, Future Estates and Interests, Perpetuities, and Accumulations. By Alfred G. Reeves, Professor of Law in the New York Law School. Boston: Little, Brown and Company. 1904. pp. lxv, 913. 8vo.

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THE COMBINATION LAWS AS ILLUSTRATING THE RELATION BETWEEN LAW AND OPINION IN ENGLAND DURING THE NINETEENTH CENTURY.[1]

NO portion of English legislation exhibits in a more striking light the close connection during the nineteenth century between the development of the law and the varying currents of public opinion than do the changes made from 1800 up to the present day in the combination law. My aim in this article is to trace out this intimate connection.

For the due comprehension, however, of the matter in hand, my readers must bear in mind three preliminary considerations.

First. The term "combination law" has, to an English lawyer, a peculiar and somewhat narrow significance.

The combination law, as the expression is used in this article and generally by English judges and lawyers, means the body of legal rules or principles which from time to time regulate the right of workmen on the one side to combine among themselves for the purpose of determining by agreement the terms on which, and especially the rate of wages at which, they will work, or, in other words, sell their labour; and the right of masters, on the other side, to combine among themselves for the purpose of de-

[1] See Wright, Law of Criminal Conspiracies. See Erle, Trade Unions; 3 Stephen, Hist. Crim. Law 206–227.

termining by agreement the terms on which, and especially the rate of wages at which, they will engage workmen, or, in other words, purchase labour.

Secondly. The combination law as thus described is merely one part of a far wider subject, namely, the legal rules regulating the exercise of a right which exists in every country, but, while under English law it has scarcely acquired a definite name, is known on the Continent and notably in France as the right of association; this right of association further is a right marked by certain special characteristics.

This right of association is nothing more than the right of two or more citizens, X, Y, and Z, to combine together by agreement among themselves for the attainment of a common purpose. This purpose or end may be of no more intrinsic importance than the formation of a dining club. It may be, on the other hand, as important as the formation of the Jacobin Club, which became the real government of France; but whether the end for which men combine be trivial or of overwhelming consequence, wherever you have union there you have an exercise or a claim to exercise the right of association. Now, one peculiarity of this right is that it may be regarded from two different points of view. It may be regarded as a mere extension of each citizen's individual freedom, that is, of his right to manage his own affairs in his own way as long as he does not trench upon the legal rights of his neighbours, whence it apparently follows [1] that whatever course of action X or Y or Z may lawfully pursue when acting without agreement, that course of action X, Y, and Z may all of them lawfully pursue when acting together under an agreement; and this undoubtedly is in general, though not without considerable limitations, the doctrine of English law: if X, Y, and Z may each of them lawfully advocate free trade or fair trade, they may assuredly all of them together with a thousand more of their friends

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[1] "The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. . . . In the part which merely concerns himself, his independence is, of right, absolute." Mill, On Liberty (ed. 1859) 21, 22. *Cf. ibid.* 27.

"Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labour or his own capital according to his own will." Erle, Trade Unions 12.

form an Anti-Corn Law League or a Fair Trade League. If X or Y or Z may each of them lawfully, as is certainly the case, cut A because of his hateful religious or political opinions, they may all, it would seem, agree together to cut him. Nor is it easy to maintain that they have not *prima facie* a right to advise or induce their friends to enter into a similar agreement; and this line of reasoning suggests, at any rate, the result that a federation of employers may lawfully agree never to employ A, though a good workman, because he has taken a leading part in a strike, and that a body of Trade Unionists may agree never to work together with non-unionists and especially not with a notorious blackleg, B, whom his former friends hold a traitor to the cause of Unionism. Does not the same view make it lawful for a body of workmen to agree that they will have no dealings with any factory where B is allowed to work, or, to carry the matter a step further, with any employer or merchant who has any dealings with a factory where B is employed to work? But this example brings us across a quite different and indeed opposite aspect of the right of association. It may be looked upon as a right of a very peculiar character, the exercise whereof leads to results which may conceivably be injurious both to individuals and to the public. When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which, by no fiction of law but from the very nature of things, differs from the individuals of whom it is constituted. *Esprit de corps* is a real and powerful sentiment; it drives men to act either above or, still more often, below the ordinary moral standard of their conduct as individuals. What, at any rate, is certain is that a body created by combination, whether a political league, a church, or a trade union, limits in some degree the freedom of its members. Its power is created by the surrender of individual liberty on the part of each of its associates, and a society may from this surrender acquire far greater strength than could be exercised by the whole of its members acting separately; a disciplined regiment acting under command is a far more formidable assailant than a thousand men who, even though armed, act without discipline or combination. Note here this further result: an association not only limits the freedom of its members, but threatens to cut short, and indeed of necessity does cut short, the individual freedom of persons who stand outside the associated body. Who can doubt that private citizens have often

found it morally impossible to resist the commands of a political association or of a powerful church? Can it be seriously maintained that a workman preserves full freedom of action when he knows that if he takes part in a strike he may ultimately be deprived of employment by the authority of a federation of employers? Has a workman, on the other hand, the liberty which the law ought to secure to every orderly citizen if he knows that the refusal to join a union may make it impossible for him to obtain employment throughout the length and breadth of the United Kingdom, and also, it may be, should the trade unionists of England and the trade unionists of America enter into a tacit alliance, throughout the length and breadth of the United States? Hence the right of association has a paradoxical character: a right which from one point of view seems to be a necessary extension of individual freedom is, from another point of view, fatal to that individual freedom of which it seems to be a mere extension.

Thirdly. This paradox raises a problem which at this moment in all civilized countries perplexes moralists and thinkers no less than legislators and judges: How is the right of association to be reconciled with each man's individual freedom? Curtail the right of association and personal liberty loses half its value. Give to the right of association unlimited scope and you destroy, not the mere value, but the existence of personal freedom.

The problem takes different shapes in different countries. In France it appears as a question of religious freedom. In the United States it excites and complicates the agitation against trusts. In Ireland it disturbs the whole relation between landlord and tenant, and compels the inquiry how far a boycott is a criminal conspiracy, or whether boycotting can be defended under the specious alias of exclusive dealing.[1] In England the limits of the right of association have hitherto been considered mainly, and indeed too exclusively, in reference to trade combinations either among workmen or employers; the alterations in the combination law will be found to be a series of attempts to solve the problem raised by the right of association and to adjust a conflict of rights,[2] namely, the right of X, Y, and Z to combine

[1] At this moment [20 April, 1904] it threatens at Limerick to take the form of a question as hateful as it is dangerous, whether traders are to be denied the rights of other British citizens because they adhere to their inherited Judaism.

[2] Such a conflict of rights may easily arise without any relation to the right of association. The law of libel and slander, for instance, is nothing but a rough attempt to maintain, on the one hand, X's right to what is popularly though inaccurately called

freely together for any purpose not definitely illegal, and the right, on the other hand, of every individual A not to be deprived by the concerted action of X, Y, and Z of that right to manage his own affairs in his own way which English law treats as the very essence of personal freedom.

The changes in the combination law are then attempts to fix the limits of the right of association in regard to trade disputes, and may be brought under four heads, which are the Tory legislation of 1800; the Benthamite reform of 1824–25; the compromise of 1875, represented by the Conspiracy and Protection of Property Act, 1875; the judicial interpretation of that Act, 1890–1904. Each of these changes bears a different character; each accurately corresponds with the opinion of the time when it took place.

(A) The combination law of 1800. The Combination Act, 1800, 40 Geo. 3, c. 106,[1] aimed in reality at one object, namely, the suppression of all combinations of workmen, whether transitory or permanent, of which the object was to obtain an advance of wages or otherwise fix the terms of employment. It was really an act for the suppression of strikes and of trade unions. The severity of the statute can be realised only by a minute study of its different provisions, to enter into which would be alien to my present purpose. Two illustrations may suffice. Under the Act it is made an offense (to put the matter shortly) to assist in maintaining men on strike:[2] persons guilty of this or any other offense under the Act are made liable to conviction on summary procedure before justices of the peace.[3]

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freedom of speech or freedom of opinion, and at the same time to protect A's right not to be damaged by the false or reckless statements of X. This example deserves notice because, after about a century of legislation, the law of libel has resulted in a roughly satisfactory adjustment of rights constantly tending to come into conflict. This fact gives some reason to hope for an ultimate adjustment of the conflict between the right of association and the right to individual freedom of action.

[1] It re-enacts in substance the Combination Act of 1799, 39 Geo. 3, c. 81. See generally as to the Combination Act, 1800, 3 Stephen, Hist. 306; Wright 12.

[2] 3 Stephen, Hist. 208.

[3] The maintenance of this summary jurisdiction is a feature of subsequent Combination Acts (5 Geo. 4, c. 95, s. 7; 6 Geo. 4, c. 129, s. 6, Conspiracy and Protection of Property Act, 1875, s. 10). Under the last Act, however, the accused has the option of trial on indictment before a jury (see, for the reasons in favour of this summary jurisdiction, Report of Committee on Combination Laws, 1875, pp. 10, 11). The desirability of obtaining a ready method for the punishment of trade offenses, which could only be effected by Act of Parliament, should be noted. It invalidates the argument that conduct made an offense under *e. g.* the Combination Act, 1800, could not be an offense at common law, since if punishable at common law it would not have been made an offense by statute.

One feature of the great Combination Act is sometimes (because of its small practical importance) overlooked. The statute imposes a penalty upon combinations among masters for the reduction of wages or for an increase in the hours or the quantity of work. To an historian of opinion this provision is of importance. It shows that in 1800 Parliament was in theory opposed to every kind of trade combination.

Behind the Combination Act — and this is a matter for my purpose of primary importance — there stood the law of conspiracy.[1] As to the exact nature of this law as then understood it would be rash to express one's self with dogmatic confidence. There are one or two features, however, of that law as it stood in 1800 of which it may be allowable to write with a certain degree of confidence.

First. The law of conspiracy had by the end of the eighteenth century received under judicial decisions a very wide extension.[2]

Secondly. A conspiracy, it is submitted, included in 1800 a combination for any of the following purposes; that is to say:

(1) For the purpose of committing a crime.[3]

(2) For the purpose of violating a private right in which the public has a sufficient interest[4] [*i. e. semble* for the purpose of committing any tort or breach of contract which materially affects the interest of the public].[5]

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[1] Sir William Erle, Sir Robert S. Wright, Sir J. F. Stephen, all of them judges, have each published on this subject books of authority. A study of their writings leaves on my mind the impression that these eminent authors have each arrived at somewhat different conclusions, and that they each felt the law of conspiracy to be obscure.

[2] Wright's work — not republished since he was raised to the bench — contains elaborate arguments to show that this extension was illegitimate, and was not really supported by the authorities on which it is supposed to rest. From a merely historical point of view these arguments are of great force, but from a legal point of view their effect is diminished by the reflection that similar arguments if employed by a lawyer of as much historical information and of as keen logical acumen as Sir R. S. Wright, would shake almost every accepted principle of English law, in so far as it does not depend upon statute. In any case Wright's arguments are for my present purpose irrelevant; my object is to state, as far as may be, not what the law of conspiracy ought to have been, but what it was in 1800.

[3] "It is undisputed law that a combination for the purpose of committing a crime is a crime" (Erle 31), and this whether the crime is known to the common law or is created by statute.

[4] Erle 32.

[5] It is arguable in spite of Turner's Case, 13 East 228, that a combination to commit any tort or for the breach of any contract with a view to damage any person, is a conspiracy, but it is not necessary for our purpose to state the law as widely as this. See Kenny, Outlines of Crim. Law 288–290.

(3) For any purpose clearly opposed to received morality or to public policy.[1]

Thirdly. Since a combination to commit a crime is *ipso facto* a conspiracy, it follows that a combination for any purpose made or declared criminal by the Combination Act, 1800, *e.g.* a combination to collect money for the support of men on strike, was in 1800 an undoubted conspiracy.

If we bear these features of the law of conspiracy in mind and recollect that the Combination Act was not intended to render unlawful any bargaining, *e.g.* as to the rate of wages between an employer and an individual workman, the combined result of the Combination Act in 1800, and the law of conspiracy, or, in other words, of the combination law as it stood at the beginning of the nineteenth century, may be thus broadly summed up: Any artisan who organized a strike or joined a trade union was a criminal and liable on conviction to imprisonment. The strike was a crime, the trade union was an unlawful association. The whole idea on which the law rested was this:

"Workmen are to be contented with the current rate of wages, and are on no account to do anything which has a tendency to compel their employers to raise it. Practically, they could go where they pleased individually and make the best bargains they could for themselves, but under no circumstances and by no means, direct or indirect, must they bring the pressure of numbers to bear on their employers or on each other."[2]

To a reader of the twentieth century this state of the law seems no less incomprehensible than intolerable, and indeed within twenty-

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[1] Erle 33, 34.

The agreements which at the present day may be held to constitute a conspiracy have been thus summarized:

(1) Agreements to commit a substantive crime (R. *v.* Davitt, 11 Cox 676; R. *v.* Whitchurch, 24 Q. B. D. 420), *e.g.* a conspiracy to steal or to incite some one to steal.

(2) Agreements to commit any tort that is malicious.

(3) Agreements to commit a breach of contract under circumstances which are peculiarly injurious to the public.

(4) Agreements to do certain other acts which, unlike those hitherto mentioned, are not breaches of law at all, but which nevertheless are outrageously immoral or else in some way extremely injurious to the public.

See Kenny, Outlines of Crim. Law, 288–290.

The definition attributed to Lord Denman of a conspiracy as a "combination for accomplishing an unlawful end, or a lawful end by unlawful means" (see Wright 63) is, it is submitted, sound, though too vague to be of much use. Its importance lies in the emphasis it lays on the *object* or *purpose* — a very different thing from the motive — of a combination as a test of its criminal character, and in the light which it throws on the wide extension given by the law to the idea of conspiracy.

[2] 3 Steph. Hist. 209.

five years after the passing of the Combination Act, appeared utterly indefensible to so rigid an economist as McCullock, a man whose good sense and genuine humanity have been concealed from a later generation by the heavy and brutal satire of Carlyle. Who, we ask, were the tyrants who deprived working-men of all freedom, and what was the state of opinion which sanctioned this tyranny? The answer is that the men who passed the great Combination Act were not despots, and that the Act precisely corresponded with the predominant beliefs of the time.

The Parliament of 1800 acted under the guidance of Pitt. It contained among its members Fox and Wilberforce; it was certainly not an assembly insensible to feelings of humanity. The ideas of the working classes were, it may be said, not represented. This is roughly true, but artisans were no better represented in the Parliament of 1824 than in the Parliament of 1800, yet the Parliament of 1824 repealed the Combination Act and freed trade combinations from the operation of the law of conspiracy. The mere fact, which appears well ascertained, that the Combination Act of 1799 and the Combination Act of 1800, which re-enacted its provisions, passed through Parliament without any discussion of which a report remains, is all but decisive. The law of the day represented in 1800 the predominant opinion of the day.

The public opinion which sanctioned the Combination Act (which was to a great extent a Consolidation Act)[1] consisted of two elements.

The first element, though not in the long run the more important, was a dread of combinations due in the main to the then recent memories of the Reign of Terror. Does later experience enable us to say that this fear was then a mere unfounded panic? Englishmen, at any rate, who, though from a distance, had witnessed the despotism of the Jacobin Club, which it is said towards the close of its tyranny sent weekly, in Paris alone, some hundreds of citizens to the guillotine, may be excused for some jealousy of clubs or unions. The existence, at any rate, of this fear of combinations is certain; it is proved by a body of acts, — 37 Geo. 3, c. 123 (1797), 39 Geo. 3, c. 69 (1799), 57 Geo. 3, c. 19 (1817), which were directed against any treasonable or seditious society, or against any society which might turn out to foster treason or

[1] *I. e.* the Combination Act generalized provisions which had been long enforced under special Acts in respect of workmen engaged in particular kinds of manufactures. See 3 Steph. Hist. 206.

sedition. The presence in these enactments of provisions in favour of Freemasons, Quakers, and Charities[1] betrays the width of their operation and the fears of their authors. Clubs of all kinds were objects of terror.

The second element of public opinion in 1800 was the tradition of paternal government which had been inherited from an earlier age and was specially congenial to the Toryism of the day. This tradition had two sides. The one was the conviction that it was the duty of labourers to work for reasonable, that is to say, for customary, wages. The other side of the same tradition was the provision by the state (at the cost, be it noted, of the well-to-do classes and especially of the landowners) of subsistence for workmen who could not find work. The so-called "Speenhamland Act of Parliament" by which the Justices of Berkshire granted to working-men relief in proportion to the number of their families, or, to use the political slang of to-day, tried to provide for them a "living wage," is the fruit of the same policy which gave birth to the Combination Act, 1800. The sentiment of the day was indeed curiously tolerant of a sort of crude socialism. Whitbread introduced a bill authorizing justices to fix a minimum of wages, and complained of the absence of any law to compel farmers to do their duty. Fox thought that magistrates should protect the poor from the injustice of grasping employers. Pitt introduced a bill for authorizing allowances out of the public rates, including the present of a cow. Burke approved a plan for enabling the "poor" to purchase terminable annuities on the security of the rates.[2]

The Combination Act, then, of 1800 represented the public opinion of 1800.

(B) The Benthamite reform.[3] In 1824 was passed 5 Geo. 4, c. 95, which placed the whole combination law on a new basis. Its provisions have thus been summarized by Sir Robert Wright:

"In 1824 the Act of 5 Geo. 4, c. 95, repealed all the then existing Acts relating to combinations of workmen, and provided that workmen should not by reason of combinations as to hours, wages or conditions of labour, or for inducing others to refuse work or to depart from work, or for regulating 'the mode of carrying on any manufacture, trade or business or the management thereof,' be liable to any criminal proceeding or pun-

[1] Wright 23, 24.

[2] Fowle, Poor Law 66, 67.

[3] The Combination Act, 1824, 5 Geo. 4, c. 95, and the Combination Act, 1825, 6 Geo. 4, c. 129. See 3 Steph. Hist. 221; Wright 13.

ishment for conspiracy or otherwise under the statute or common law. By another section it extended a similar immunity to combinations of masters. On the other hand it enacted a penalty of two months' imprisonment for violence, threats, intimidation and malicious mischief." [1]

This Act was repealed after a year's trial and was replaced by the Combination Act, 1825, 6 Geo. 4, c. 129, which also has been thus summarized by Wright:

"This Act again repealed the older statutes, but without mention of common law. It provided summary penalties for the use of violence, threats, intimidation, molestation, or obstruction by any person for the purpose of forcing a master to alter his mode of business, or a workman to refuse or leave work, or of forcing any person to belong or subscribe or to conform to the rules of any club or association. It did not expressly penalize any combination or conspiracy, and it exempted from all liability to punishment the mere meeting of masters or workmen for settling the conditions as to wages and hours on which the persons present at the meeting would consent to employ or serve." [2]

Even a trained lawyer may fail at first sight to perceive wherein lies the difference between the two Acts, or to conjecture why the one was substituted for the other, yet it will be found that the similarity and the difference between the two enactments are equally important, and that, whilst the repeal of the earlier Act is perfectly explainable, the singular course of legislation in 1824 and 1825 is the exact reflection of the current of opinion. Each point merits separate consideration.

As to the points of similarity. Both Acts aim at the same object; they both reverse the policy of 1800, and are intended to establish free trade in labour; they both, as a part of such freedom of trade, concede to men and to masters alike the right to discuss and agree together as to the terms on which they will sell or purchase labour; both give expression to the idea that the sale or purchase of labour should be as entirely a matter of free contract as the purchase of boots and shoes. Both Acts therefore repeal the great Combination Act and all earlier legislation against trade combinations. Both Acts, lastly, impose severe penalties on the use of violence, threats, or intimidation whereby the contractual freedom of an individual workman or an individual master may be curtailed, and both Acts provide the machinery whereby these penalties may be summarily enforced. The labour contract under

[1] Wright 13. [2] Wright 13.

each Act is intended to be perfectly and strictly free. Combinations to raise or lower wages and the like are no longer forbidden, but neither individuals nor combinations are to interfere with the right of each person freely to enter into any labour contract which may suit the contracting parties.

As to the difference. The Act of 1824 allows freedom of combination for trade purposes, both to men and to masters in the very widest terms,[1] and (what is the matter specially to be noted) exempts trade combinations from the operation of the law of conspiracy. It then imposes penalties upon the use of violence, threats, or intimidation for certain definite purposes, *e.g.*, the compelling a workman to depart from his work.

The Combination Act, 1825, on the other hand, in the first place, imposes penalties upon the use of violence, threats, or intimidation for almost any purpose which could conceivably interfere with individual freedom of contract on the part of an individual workman or with the right of a master to manage his business in the way he thought fit. The Act, in the next place, confers indirectly[2]

[1] Sect. 2 exempts from liability "to any indictment or prosecution for conspiracy, or to any other criminal information or punishment whatever, under the common or the statute law," "journeymen, workmen, or other persons who shall enter into any combination to obtain an advance, or to fix the rate of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to induce another to depart from his service before the end of the time or the term for which he is hired, or to quit or return his work before the same shall be finished, or, not being hired, to refuse to enter into work or employment, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof." Under this section a combination of X, Y, and Z to induce a workman to break a contract of work or to induce a master to dismiss all workmen who were not trade unionists, would *semble*, not have been a conspiracy. Sect. 3 gives an analogous exemption to masters.

[2] Sect. 4. "Provided always . . . that this Act shall not extend to subject any persons to punishment, who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices, which the persons present at such meeting, or any of them, shall require or demand for his or their work, or the hours or time for which he or they shall work in any manufacture, trade or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours of time for which he or they will work, in any manufacture, trade or business; and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing; any law or statute to the contrary notwithstanding." Section 5 provides an analogous exemption for meetings of masters to settle the rate of wages, etc.

A comparison between the Act of 1824, section 2, and the Act of 1825, section 3, shows that the liberty of combination allowed under the first Act is a good deal wider than that allowed under the second.

upon workmen and masters a limited right to meet together and come to agreements for settling the rate of wages, and the like, which the persons present at the meeting will accept or give. The Act, lastly, revives the law of conspiracy in regard to trade combinations.

The result, therefore, of the Combination Act, 1825 (at any rate, as interpreted by the courts), was this:

Any trade combination was a conspiracy unless it fell within the limited right of combination given by the Act of 1825.[1]

A strike, though not necessarily a conspiracy, certainly might be so, and a trade union, as being a combination in restraint of trade, was at best a non-lawful society,[2] *i.e.*, a society which, though membership in it was not a crime, yet could not claim the protection of the law.

The course of parliamentary legislation with regard to the combination law in 1824 and 1825 was singular, but in all its features it exactly represents the dominant opinion, that is, the Benthamite individualism of the day. The Act of 1824 was the work of known Benthamites. McCullock advocated its principles in the "Edinburgh Review"; Joseph Hume brought it as a bill into Parliament; the astuteness of Francis Place, in whose hands Hume was a puppet, made it possible to pass into law a bill, of which the full effect was not perceived, either by its advocates or by its opponents. The Act gives expression in the simplest and most direct form to two convictions pre-eminently characteristic of the Benthamites and the political economists. The one is the belief that trade in labour ought to be as free as any other kind of trade; the other is the well-grounded conviction that there ought to be one and the same law for men as for masters. Adam Smith had some fifty years before pointed out that trade combinations on the part of workmen were blamed and punished, whilst trade combinations on the part of masters were neither punished nor indeed noticed.[3] Liberty and equality, each of which represent the best aspect of *laissez faire*, were the fundamental ideas embodied in the Act of 1824.

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[1] This Act "left the common law of conspiracy in force against all combinations in restraint of trade, the combinations exempted from penalty under ss. 4 and 5 alone excepted." Erle 58. This is, it is submitted, the right view of the law. Contrast however 3 Stephen, Hist. 223.

[2] Farrer *v.* Close (1869), L. R. 4 Q. B. 602.

[3] See Wealth of Nations, ch. viii. pp. 97–102 (6th ed. 1791).

Why, then, was the Act of 1824 repealed and replaced by the Act of 1825?

Something — even a good deal — was due to accidental circumstances. In spite of the sagacious advice of Francis Place, workmen who were unused to the right of combination used their newly acquired power with imprudence, not to say unfairness. A large number of strikes took place, and these strikes were accompanied by violence and oppression. The artisans of Glasgow "boycotted," as we should now say, and tried to ruin an unpopular manufacturer. The classes whose voices were heard in Parliament were panic struck, and their alarm was not unreasonable. Hence the demand for the repeal of the Combination Act, 1824. Place, after his manner, attributes the success of this demand to the baseness of parliamentary statesmen, to the bad faith of Huskisson, and, above all, to the machinations of one politician, who "lied so openly, so grossly, so repeatedly, and so shamelessly" as to astonish even the critic, who had always considered this individual "a pitiful, shuffling fellow."[1] This pitiful, shuffling fellow was the well-known Sir Robert Peel.[2] He had, at any rate, as we might expect, something which is worth hearing to urge in support of his conduct. Peel has left on record the ground of his opposition to the Act of 1824. It is that "sufficient precautions were not taken in [that Act] . . . to prevent that species of annoyance which numbers can exercise towards individuals, short of personal violence and actual threat, but nearly as effectual for its object."[3]

Here we pass from the transitory circumstances of a particular year and touch the true, if unperceived, cause of the reaction against the Combination Act of 1824. The right of combination which was meant to extend personal freedom was so used as to menace the personal freedom both of men and of masters. By the legislation of 1824 Benthamites and economists, that is, enlightened individualists, had extended the right of combination in order to enlarge the area of individual freedom; by the Act of 1825 sincere individualists, among whom Peel may assuredly be numbered, limited the right of trade combination in order to preserve the contractual freedom of workmen and of masters. The men who passed the Act of 1824 meant to establish free trade in labour, they did

[1] Life of F. Place, 236.

[2] Then Mr. Peel.

[3] Peel's Private Correspondence, 379 (London, 1891).

not mean to cut short the contractual capacity of persons who preferred not to join or resisted the policy of trade unions. The two Acts which seem contradictory are in reality different applications of that *laissez faire* which was a vital article of the utilitarian creed; the economists and Liberals who in 1824 had begun to guide legislative opinion were the sincerest and most enthusiastic of individualists. It is hard for the men of 1904 to realize how earnest eighty years ago was the faith of the best men in England in individual energy and in the wisdom of leaving every one free to pursue his own course of action as long as he did not trench upon the like liberty or the rights of his fellows. To such reformers oppression exercised by the state was not more detestable than oppression exercised by trade unions. Place was a Benthamite fanatic. His finest characteristic was passionate zeal for the interest of the working class whence he sprung. He knew workmen well, he had no love for employers. Yet Place, and we may be sure many wiser men with him, believed and hoped that the repeal of the combination law of 1800 would put an end to trade unions.

"The combinations of the men are but defensive measures resorted to for the purpose of counteracting the offensive ones of their masters . . . when every man knew that he could carry his labour to the highest bidder, there would be less motive for those combinations which now exist, and which exist because such combinations are the *only* means of redress that they have." [1]

So Place in 1825. Eighteen years later thus writes Richard Cobden:

"Depend upon it nothing can be got by fraternising with trade unions; they are founded upon principles of brutal tyranny and monopoly. I would rather live under a Dey of Algiers than a trades committee." [2]

In 1850 Miss Martineau is well assured that the Act of 1825 was a necessary and salutary measure:

"By this act [*i. e.* the Combination Act, 1825] combinations of masters and workmen to settle terms about wages and hours of labour are made legal; but combinations for controlling employers by moral violence were again put under the operation of the common law. By this as much was done for the freedom and security of both parties as can be done by legislation, which, in this matter, as in all others, is an inferior safeguard to that of personal intelligence." [3]

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[1] Life of F. Place, p. 217, and see further p. 218.

[2] Cobden, 1 Morley, ch. xiii. p. 299.

[3] 1 H. Martineau's Thirty Years' Peace (ed. 1877) 474.

What is of even more consequence, the best and wisest of the judges who administered the law of England during the fifty years which followed 1825 were thoroughly imbued with Benthamite Liberalism. They believed that the attempt of trade unions to raise the rate of wages was something like an attempt to oppose a law of nature. They were convinced — and here it is difficult to assert that they erred — that trade unionism was opposed to individual freedom, that picketing, for example, was simply a form of intimidation, and that though a strike might in theory be legal, a strike could in practice hardly be carried out with effect without the employment of some form of intimidation either towards masters or non-unionists. No judges have ever deserved or earned more respect than Erle and Bramwell, yet Erle deliberately maintained that under the Act of 1825 any combination might be a conspiracy that interfered with "the free course of trade," whilst Bramwell enounced the doctrine that "the liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much a subject of the law's protection as that of his body." His language is as wide as possible:

"Generally speaking, the way in which people have endeavoured to control the operation of the minds of men is by putting restraints on their bodies, and therefore we have not so many instances in which the liberty of the mind is vindicated as that of the body. Still, if any set of men agreed amongst themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves. I am referring to coercion and compulsion — something that is unpleasant and annoying to the mind operated upon; and I lay it down as clear and undoubted law that, if two or more persons agree that they will by such means co-operate together against that liberty, they are guilty of an indictable offence."[1]

Bramwell's doctrine moreover, laid down in 1867, harmonizes with that treatise of Mill "On Liberty," which was the final and authoritative apology for the Benthamite faith in individual freedom.

We may feel therefore assured that the legislation of 1824–25 was not intentionally unjust, and represented even in its fluctuation the best and most liberal opinion of the time. The individualism of 1825 is open to one comment: individualists, whether jurists or

[1] R. *v.* Druitt (1867), 10 Cox 600, per Bramwell, B., cited 3 Steph. Hist. 221, 222.

economists, had not then and indeed never have fully recognised the characteristics of combined action. In common with the revolutionary reformers of France they recognised as a fact the power of the state and the rights of individuals, but they never studied the mode in which individual action is modified when you consider men, not as isolated from their fellows, but as members of society or of special societies. They saw, and saw truly, that the need of the time was, at any rate as regards trade, to free workmen and masters from the trammels imposed by law on individual action. They did not see the difficulty of reconciling individual freedom with the right of association; they could not supply the solution of a problem whereof they hardly acknowledged the existence. A few lines in Mill, "On Liberty," are all the reference he makes to the proper limits of combined action. He and the school to which he belonged seemed to have held that when once the area of individual liberty was defined it was unnecessary to lay down any rules either of law or of morality for fostering or checking the use of the power arising from combination. In any case the doctrine both of Mill and of his teachers is uncertain and indistinct, and indistinctness of belief always begets inconsistency of action. The combination law of 1825 stood almost unaltered for fifty years. The experiment of trying to establish free trade in labour was probably a wise one; whether the Act of 1825 ought to have been repealed may still admit of discussion. Two things are certain. Its provisions caused dissatisfaction, and the Liberals of the day, imbued in the main with Benthamite doctrine, could provide no clear principle for its amendment.

(C) The compromise of 1875.[1] This compromise revolutionized the combination law. It is marked by the following characteristics:

First. No trade combination on the part either of employers or workmen to do any act which if committed by one person would not be punishable as a crime can, since the passing of the Act of 1875, be *indictable* as a conspiracy.[2] Hence,

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[1] The Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86; the Trade Union Act, 1871, 34 & 35 Vict. c. 31; the Trade Union Act, 1876, 39 & 40 Vict. c. 22.

[2] "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." Conspiracy and Protection of Property Act, 1875, s. 3, 1st clause. Contrast the language of the Combination Act, 1824 (5 Geo. 4, c. 95), s. 2, enacting that any journeyman, workman, or other persons who enter (to

Secondly. A trade combination is placed in a different position from that occupied by combinations which are not trade combinations, for whilst a trade combination cannot be indictable as a conspiracy unless it is a combination to do an act which may be a crime if done by an individual acting alone, a combination which is not a trade combination may be indictable as a conspiracy, even though it is a combination to do an act which would not be a crime if done by an individual if acting alone.

X, acting alone, leaves the employment of a manufacturer, A, without due notice and in breach of his contract of service. X does not commit a crime. X, Y, and Z form a trade combination for the purpose of simultaneously leaving the employment of A without due notice and in breach of their contract of service. The combination of X, Y, and Z is, under the Conspiracy and Protection of Property Act, 1875, not an indictable conspiracy.

X, on the other hand, a tenant of a landlord A, declines to pay his rent. X has not committed a crime, but at most a breach of contract.

X, Y, and Z, tenants of A, enter into a combination not to pay rent to A. This combination, which has no reference to a trade dispute and therefore does not fall within the Conspiracy and Protection of Property Act, 1875, is or may be indictable as a criminal conspiracy.

Thirdly. Trade unions which under the Combination Act, 1825, were at best non-lawful societies as being in restraint of trade, are, under the Trade Unions Act, 1871 and 1876, not to be held unlawful societies on the mere ground that their purposes are in restraint of trade.[1] A trade union, in short, is *prima facie* a lawful society, though of course it may, like any other association, become an unlawful society if it is formed for or pursues unlawful objects. Persons therefore, whether trade union officials or others, who defraud a union, *e. g.* embezzle its funds, are punishable like any other persons guilty of embezzlement; but though trade unions are lawful societies, trade union contracts, that is, agreements between the members of a trade union or between two trade unions, are in general not directly enforceable by law.[2]

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put the matter shortly) into any trade combination "shall not therefore be subject or liable to any indictment or prosecution for conspiracy or to any other criminal information or punishment whatever under the common or the statute law."

[1] Trade Union Act, 1871, ss. 2, 3.

[2] See Trade Union Act, 1871, s. 4.

To put the matter broadly the trade union is a lawful club but a club of which the

Fourthly. Any person guilty of intimidation or annoyance to any other person, *e.g.* a fellow workman, with a view to interfering with such workman's legal freedom of action or who with this view does certain specific injuries to such other workman, *e.g.* besets his dwelling-house, is guilty of an offense punishable with imprisonment, whence it follows that a combination to commit such offense or crime is a conspiracy, but "picketing" — I purposely use popular, not technical language — is, in reality, more or less legalised, as long as it is moderate picketing which does not amount to intimidation.

The general character of the compromise of 1875 is unmistakable. It constitutes a modification of the combination law, which is greatly in favour of workmen, at any rate in so far as they are trade unionists. The policy of 1800 is distinctly reversed. In 1800 trade combinations, whether temporary combinations, such as strikes, or permanent combinations, such as trade unions, were regarded by the law with the gravest disfavour. It is extremely doubtful whether any one who participated in such combinations could avoid committing a crime. In 1875 trade combinations are greatly favoured by the law; they are not indictable as conspiracies in cases in which other combinations may be indictable as conspiracies. Trade unions, though not made corporate bodies, are lawful societies. The compromise, further, is, from the point of view of trade unionists, a great advance on the combination law of 1825. In 1825 the liberty given to trade combinations was extremely limited, and severe penalties were imposed on every kind of intimidation of which workmen on strike or trade unions might conceivably be guilty. Under the compromise of 1875 freedom of combination is extended further than even under the Act of 1824,[1] and only a limited number of definite acts remain punishable under the head of intimidation. But the compromise, though favourable to trade unionists, is a compromise. The legislature has clearly intended to provide for the protection of individuals, whether masters or workmen, whose legal liberty of action might be infringed by trade combinations; and the effect of the compromise was in 1875, on some points, open to doubt.

A study of the Act of 1875 and the other enactments with which it ought to be read, as well as the known facts of history,

courts will not directly enforce the rules, *e. g.* as to payment of subscriptions and the like, as against any member.

[1] See *ante*, p. 521, n. 1.

easily explain the state of opinion which gave birth to the compromise of 1875. The Benthamite reform of 1825 was dominated throughout by the desire of the Benthamite reformers, who were stringent individualists, to protect at all costs every individual's contractual capacity. The Act, moreover, of 1825 had been interpreted by magistrates who were themselves individualists, and who, following the guidance of Parliament, used the law of conspiracy to check combinations which aimed at purposes in restraint of trade, and moreover to protect individual freedom of action. Hence, for fifty years, a conflict between the law, as expounded by the courts, and the habits and wishes of trade unionists. The judges held that, though a strike in itself might be legal, a strike almost inevitably led to acts which were criminal. Trade unionists, on the other hand, who at one time (1832–50) accepted, in name at least, the doctrine of *laissez faire*, interpreted it as allowing unlimited freedom of combination for any objects which were not distinctly criminal, and held that if a strike was legal, conduct such as picketing, necessary to the maintenance of a strike, could not be a crime. By 1875 two changes had taken place: the force of individualism had declined, and in many branches of the law could be traced the rising authority of collectivism. Meanwhile the artisans had obtained the parliamentary franchise, and there existed among Liberals and also among Conservatives a tendency to overrate the wisdom and the virtues of working-men. Hence the ideas of trade unionists, which in 1861 were utterly unrepresented in a middle-class Parliament,[1] received at least the attention which was their due in the more or less democratic Parliament of 1875. The old ideas, however, congenial to individualism, and inherited from the reformers of 1832, were still potent. No English Parliament was prepared to leave individual freedom unprotected against combined numbers. This was a condition of opinion which naturally produced a compromise, and a compromise favourable, on the whole, to working-men; and such favour was the more natural because, in England at any rate, trade union leaders had, on the whole, exercised their power with moderation.

(D) The judicial interpretation of the compromise. The legislation of 1875 left many questions open: What was the true position of a trade union? What were the principles on which

[1] Mill, Rep. Gov. 56, 57.

to determine whether a combination of any kind was a conspiracy at common law? Could an individual who suffered damage through a trade combination recover damages in an action where under the Conspiracy and Protection of Property Act, 1875, the combination was not indictable as a conspiracy?

These and other inquiries of the same sort were left to the decision of the courts. Trade unionists and many lawyers believed that they must all be answered in the way most favourable to the free action of the unions. Since 1885, however, cases requiring the interpretation of the compromise of 1875 have come frequently before the courts. The exact effect of the judgments delivered is in some degree a subject of dispute. The following principles, however, may (it is submitted) be deduced from decided cases.

1. An act lawful in itself is not by the mere existence of a bad *motive* converted into an unlawful act so as to render the doer thereof liable to an action by a person who suffers damage from such act.[1]

But note that the *motive* influencing the doer of an act is in itself a totally different thing, though often confounded with the *purpose* or *object* for the attainment of which he does the act.

2. Acts which are not in themselves unlawful when done by persons acting in combination, solely with the lawful object of protecting their trade and increasing their profits, are not actionable.[2]

3. A combination of X, Y, and Z to do an act which, if done by X alone, would not be either criminal or wrongful, may be a conspiracy.[3]

4. A combination of X, Y, and Z to break, or to cause others to break, a contract with A, or (*semble*) to induce others not to enter into contracts with A, is, in the absence of distinct legal justification, a conspiracy, and gives A, if damaged thereby, a cause of action.[4]

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[1] Allen *v.* Flood, [1898] A. C. 1; Quinn *v.* Leathem, [1901] A. C. 495; Stevenson *v.* Newnham (1853), 13 C. B. 297.

[2] Mogul Steamship Co. *v.* McGregor, [1892] A. C. 25; 23 Q. B. D. (C. A.) 598. In other words, trade competition is considered beneficial to the public, and acts legal in themselves do not become actionable because they are done by persons acting in combination solely for the purpose of trade competition.

[3] Mogul Steamship Co. *v.* McGregor, [1892] A. C. 25, 45, judgment of Bramwell, and 23 Q. B. D. 598, 616, judgment of Bowen, L. J.

[4] Quinn *v.* Leathem, [1901] A. C. 495; Temperton *v.* Russell, [1893] 1 Q. B. (C. A.) 715.

5. The Conspiracy and Protection of Property Act, 1875, s. 3, has nothing to do with civil remedies ; a trade combination, that is to say, of X, Y, and Z, which is not indictable as a conspiracy, may yet, if it damages A, give A a right of action.[1]

6. A registered, and probably an unregistered, trade union is liable to be sued for torts committed by its agents; and also, it would seem, is competent to sue as a plaintiff.

The interpretation put by the courts on the compromise of 1875 is, it is submitted, from a legal point of view, thoroughly sound, and will commend itself to men of whatever party who still hold that personal liberty is the basis of national welfare. But this interpretation does undoubtedly deprive trade unionists of advantages which, in common with many lawyers, they believed that they had obtained under the Act of 1875. It is now, at any rate, abundantly clear that neither trade unions nor any other associations can under English law possess property without incurring that liability to pay damages for wrongs done by themselves or by their agents which attaches to all property holders. In a sense, therefore, the interpretation put by the courts upon the Act of 1875, and other enactments connected with it, does mark a reaction not against the provisions of that Act, but against the tendency so to construe them as to confer upon trade unions a position of privilege.

The causes of this reaction are to be found in the current of opinion, and indeed might be all summed up in the existence of the one word "boycott." The term, which has obtained a world-wide acceptance, came into being during the autumn of 1880.[2] It spread far and wide because it supplied a new name for an old social disease which had reappeared in a new and most dangerous form. It bore witness to the pressing peril that freedom of combination might, if unrestrained, give a death-blow to individual liberty.

The results, then, of our survey can be thus summed up :

The combination law has from the end of the eighteenth century precisely corresponded with the course of opinion.

The Combination Act, 1800, represents the panic-stricken but paternal Toryism of that date.

The Combination Acts, 1824, 1825, even in their singular fluc-

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[1] Quinn *v.* Leathem *supra;* Glamorgan Coal Co. *v.* South Wales Miners Fed., [1903] 2 K. B. (C. A.) 505; Giblan *v.* National, etc., Union, [1903] 2 K. B. (C. A.) 600.

[2] See "Boycott" in Murray's Dictionary.

tuation, precisely correspond with the Benthamite ideal of free trade in labour.

The compromise of 1875 represents in the main the combined influence of democracy and collectivism.

The interpretation of that compromise by the courts represents the belief, still strong in England, in the sacredness of individual liberty and the sense of the peril to which personal liberty is exposed by an unrestricted right of combination.

The very confusion of the present state of the law corresponds with and illustrates a confused state of opinion. We all of us in England still fancy at least that we believe in the blessings of freedom, yet, to quote an expression which has become proverbial, "to-day we are all of us socialists." The confusion reaches much deeper than a mere opposition between the beliefs of different classes. Let each man, according to the advice of preachers, look within. He will find that inconsistent social theories are battling in his own mind for victory. Lord Bramwell, the most convinced of individualists, became before his death an impressive and interesting survival of the beliefs of a past age; yet Lord Bramwell himself writes to a friend, "I am something of a socialist." If, then, the law be confused, it all the more accurately reflects the spirit of the time.

A. V. Dicey.

OXFORD, April 26, 1904.

THE ANTI-TRUST ACT AND THE MERGER CASE.

THE constitutionality of the Anti-Trust Act is based upon the grant to Congress of power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." It was settled, before the case of the Northern Securities Company arose, that the power thus granted includes power to prohibit such acts as would obstruct the avenues of interstate commerce or interfere with its freedom.[1] The Anti-Trust Act declares to be illegal "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." In the case of the Northern Securities Company,[2] therefore, the government had but two facts to establish, namely, (1) that there was a contract, combination, or conspiracy; and (2) that this contract, combination, or conspiracy was "in restraint of trade or commerce" within the meaning of the Act, and, if carried out, would cause such an obstruction of commerce or interference with its freedom as Congress could prohibit.

All the judges of the Supreme Court appear to have reached the conclusion that the evidence showed the existence of some contract or combination, though they differed upon the question whether this contract or combination was in restraint of interstate commerce, within the meaning of the Act, and also upon the question whether the Act, as construed by the majority of the court, was constitutional. The precise character of the contract or combination found by the court to exist was not clearly defined in the opinions. The majority of the judges appear to have proceeded on the assumption that the combination was formed by the principal shareholders of the Northern Pacific Company and of the Great Northern Company prior to the formation of the Northern Securities Company, and that the formation of the Northern

[1] *In re* Debs, 158 U. S. 564; Addyston Pipe, etc., Co. *v.* U. S., 175 U. S. 211, see pp. 227, 230.

[2] Northern Securities Co. *v.* U. S., 193 U. S. 197.

Securities Company was merely a means of carrying out this antecedent combination or arrangement.

It is difficult to base the decision on this ground. If there was a combination among the principal shareholders of the two railroad companies prior to the organization of the Northern Securities Company, that combination had ceased to exist at the time of the commencement of the suit. The purposes of the Northern Securities Company, expressed in its certificate of incorporation, were entirely lawful, and the corporation was legally organized under the laws of New Jersey. It is clear that the mere motives of some, or of all of those forming the corporation were not material. New parties, who had no connection with the original combination, had become shareholders in the Northern Securities Company. Very grave difficulties would result if the principle were now established that a corporation may be held responsible for antecedent acts or combinations of those who caused the corporation to be organized, or who subsequently became its principal shareholders.

However, it is clear that a corporation, in fact, is a combination of its shareholders. A partnership or unincorporated joint-stock company is a combination of individuals, as partners, for the purposes and upon the terms set forth in a partnership contract; and an incorporated joint-stock company, or corporation aggregate formed for business purposes, is a combination of individuals, as shareholders, for the purposes and upon the terms set forth in a charter or articles of incorporation. The Supreme Court, therefore, might properly have held that any joint-stock company, whether technically a corporation or not, is a continuing "combination in the form of a trust or otherwise," within the meaning of the Act, without passing upon the question whether the word "trust" was used in the Act in its technical sense, or in the sense which it had acquired by popular use at the time of the passage of the Act. Although the Northern Securities Company was lawfully organized, and at the time of its organization was not a combination in restraint of commerce (whatever the expectations or motives of those forming the company may have been), yet, if the subsequent acquisition of a controlling interest in the stocks of the two railroad companies operated as a restraint of interstate commerce, such acquisition may have made the combination become an illegal combination under the Anti-Trust Act. Similarly, a partnership originally formed for a lawful business may become an

unlawful combination by subsequently engaging in an unlawful business. The conclusion that an unlawful combination existed, therefore, should be based upon the ground that the Northern Securities Company, by acquiring control of the stocks of the two railroad companies, made itself an illegal combination, though previously it was a lawful combination.

Assuming that a combination existed, the question remains whether this combination was "in restraint of trade or commerce among the several States, or with foreign nations," within the meaning of the Act of Congress. A majority of the judges of the Supreme Court held that the combination was in restraint of interstate commerce, because its direct effect was to destroy the possibility of real competition between two railway lines that were important arteries of interstate commerce. Mr. Justice Holmes, with whom concurred three of the justices, appears to have held that the Act applied only to such contracts and combinations as were illegal at common law, and that these consisted only of the following two classes, viz.: (1) contracts with a stranger to the contractor's business (although in some cases carrying on a similar one) which wholly or partially restricted the freedom of the contractor himself in carrying on his own business, and (2) combinations or conspiracies to keep strangers to the agreement out of business. He also held that a partnership, or combination, which merely suppressed competition among those becoming parties to the partnership, or combination, by creating a community of interest among them, was not illegal at common law and was not prohibited by the Anti-Trust Act.

Having regard to the broad language of the Act, and to the fact that the Act undoubtedly was designed to remedy certain evils supposed to result from the formation of the large combinations of capital which at the time of the passage of the Act were revolutionizing the business world, it may be affirmed with confidence that Congress did not intend to use the words "in restraint of trade or commerce" in a narrow and technical sense, and to prohibit only such contracts and combinations in restraint of trade or commerce as were illegal at common law. The reasonable presumption is that Congress intended the Act to mean all that its language fairly expressed, and to prohibit every contract or combination that, in fact, operated as a restraint of interstate commerce, — so far as Congress had constitutional power to prohibit the same.

The precise limit of the power of Congress to make laws for carrying into execution the broad powers expressly delegated to Congress, cannot be determined by the application of technical or definite rules. The question often can be solved only by considering the true spirit and purpose of the Constitution and the practical results of the legislation in question. Moreover, no provision of the Constitution can be construed without reference to other provisions. Thus, the provision that no person shall be deprived of life, liberty, or property without due process of law must be deemed limited by the express grant to Congress of power to deal with certain specified subjects, including the power to regulate commerce; but the freedom of individuals to act, contract, and dispose of their property cannot be interfered with, except by legislation that fairly can be considered an exercise of some power expressly granted. The power to regulate interstate commerce was given to Congress for the purpose of securing to all the people of the United States free and unobstructed interstate commerce, without interference by legislation of the several states, and governed only by such regulations as Congress might see fit to impose. Congress may prescribe rules to govern the transaction of interstate commerce. Congress may exercise the police power over interstate commerce by prohibiting the transaction of interstate commerce that would be injurious to the health, morals, or peace of the community.[1] Congress, also, may preserve and protect interstate commerce by prohibiting acts that would operate as restrictions of the freedom of carrying on interstate commerce upon navigable waters, railways, or other avenues of interstate commerce. But it was not the purpose of the Constitution to take away from the states and to confer upon Congress power to enact all laws relating in any way to any matter connected with interstate commerce. A law is not a regulation of commerce among the several states, within the meaning of the Constitution, unless it regulates some subject that is connected with interstate commerce directly, or proximately, and not merely remotely; nor unless it regulates this subject in some particular bearing a direct relation to interstate commerce; nor unless it can fairly be said, upon considering the whole scope of the law, that it is a regulation of interstate commerce, and not a regulation of some other subject which Congress was not empowered to regulate.

[1] See Lottery Case, 188 U. S. 321.

Thus, to quote the illustration used by Mr. Justice Holmes in the case of the Northern Securities Company: "Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce." Railroads are directly connected with interstate commerce and, in fact, are instruments of interstate commerce; but that would not take away from the states and confer upon Congress the power to regulate the ownership of railroads, or their contracts and other dealings, except in direct relation to the transaction of interstate commerce. Partnerships or corporations engaged in interstate commerce, and contracts for the sale of property to be shipped into other states, are connected directly with interstate commerce; but Congress could not, on that ground, undertake to regulate such partnerships, corporations, and contracts, except in their direct relations to interstate commerce. Again, a law prescribing hours of work, or fixing the rate of wages of persons employed in the transaction of interstate commerce, would relate to a matter connected directly with interstate commerce; but such a law could not fairly be called a regulation of interstate commerce, because this obviously would not be its real and primary effect and purpose.

The Constitution does not, in terms, confer upon Congress power to prohibit either restraints of interstate commerce, or restraints of competition in interstate commerce. The Anti-Trust Act, in terms, prohibits contracts, combinations, and conspiracies in restraint of interstate trade or commerce, but does not, in terms, prohibit contracts, combinations, or conspiracies in restraint of competition. A contract or combination in restraint of competition would not be prohibited by the Act unless it be "in restraint of trade or commerce among the several states, or with foreign nations," and the prohibition must be limited to such obstructions of commerce, or interferences with its freedom, as Congress could constitutionally prohibit. Certain classes of contracts and combinations limiting competition have always been incidental to the transaction of trade and commerce according to business customs, and have never been regarded as restraints of trade or commerce. A law prohibiting such contracts and combinations would itself operate as a restraint upon commerce. It seems fair, therefore, to assume that Congress had not the intention, even if it had the power, to prohibit contracts and combinations of this character. As stated by Mr. Justice Brewer in the case of the Northern Securities Company: "Congress did not intend to reach and destroy

those minor contracts in partial restraint of trade which the long course of decisions at common-law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts that were in direct restraint of trade, unreasonable and against public policy."

In U. S. *v.* E. C. Knight Co.[1] the Supreme Court decided that the acquisition by the American Sugar Refining Company of the stock of four other sugar refining companies, was not in violation of the Anti-Trust Act, although the several companies had been shipping their products to other states and foreign countries, and the purchase gave to the American Sugar Refining Company a practical monopoly of the business of selling sugar in the United States. This decision was clearly right. The court appears to have based its conclusion principally on the ground that the contract or combination complained of related only to the acquisition of certain sugar refineries and did not constitute a *direct* restraint of interstate commerce. A better ground for the decision would seem to be that a contract or combination among manufacturers or shippers of an article to suppress competition among themselves is not such an obstruction of interstate commerce or interference with it as Congress can constitutionally prohibit. It was undoubtedly the purpose and the effect of the contract or combination in this case to suppress competition in the sale and shipment of refined sugar throughout the United States, and if that, in fact, was such an obstruction of interstate commerce as Congress could constitutionally prohibit, the fact that there was no express contract to cause this obstruction, and that it was effected indirectly, is hardly a sufficient ground for holding that Congress was powerless to prevent it.

In the cases of the Trans-Missouri Freight Association[2] and of the Joint Traffic Association,[3] the Supreme Court held that a contract or combination among several railroad companies for fixing their rates upon competitive interstate business, was directly in restraint of interstate commerce and was rendered illegal by the Anti-Trust Act. Congress undoubtedly had constitutional power to prohibit contracts or combinations obstructing or unreasonably interfering with the transaction, by the public, of interstate commerce upon railways or other highways, whether the obstruction

[1] 156 U. S. 1. [2] U. S. *v.* Trans-Missouri Freight Association, 166 U. S. 290.
[3] U. S. *v.* Joint Traffic Association, 171 U. S. 505.

or interference be effected by physical force, or by the refusal of the railway companies to permit interstate shipments, or by the imposition of more than reasonable rates therefor. It was argued in these cases that, while the contracts complained of may have restricted competition, they did not impose unreasonable rates, and therefore were not in restraint of commerce; but a majority of the court held that every restraint of competition among railroad companies would to some extent restrain commerce, and that the courts cannot inquire into the reasonableness of any restraint. It is, no doubt, true that the courts cannot inquire into the wisdom or desirability of an actual obstruction or restraint of commerce prohibited by Congress; but if a contract or combination among railroad carriers does not affect interstate commerce except by restricting competition, the question whether such restriction of competition is reasonable or unreasonable would be material for the purpose of determining whether it did in truth operate as an obstruction or restraint of commerce. Some contracts of railroad companies in restraint of competition may obstruct interstate commerce, but that would not be true in fact of a contract to maintain rates that are reasonable.[1]

In the case of the Addyston Pipe Company[2] the Supreme Court took a long step further when it held that a contract among manufacturers of iron pipe restricting competition among them in the sale of their product was such an interference with interstate commerce as Congress could prohibit. The contract in this case did not in any degree obstruct or hinder the public in carrying on interstate commerce; its effect, at most, was to restrain certain pipe manufacturers, who were parties to the contract, in the shipment of their pipe into other states. Congress cannot compel individuals to engage in interstate commerce or to compete in interstate commerce ; and a contract among individual shippers not to compete among themselves would not obstruct or hinder the public in carrying on commerce. A law prohibiting such a contract would not be a measure to regulate the interstate commerce of the people generally, or to keep the channels of interstate

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[1] Upon this point see opinion of the court in the Trans-Missouri Freight Association case, 166 U. S. p. 339, and in the Joint Traffic Association case, 171 U. S. p. 575. The right of railway companies to charge reasonable rates upon interstate traffic was, of course, conceded in these cases. See also Hopkins *v.* U. S., 171 U. S. 578, pp. 592–594.

[2] Addyston Pipe, etc., Co. *v.* U. S., 175 U. S. 211.

commerce unobstructed and free from restraint, subject only to regulations imposed by Congress. It would really be a measure to secure to consumers the benefit of lower prices through competition.

In Montague *v.* Lowry [1] the Supreme Court held that the Anti-Trust Act rendered illegal a contract or combination among certain dealers in tiles in California and manufacturers of tiles in Eastern states, whereby the manufacturers were prohibited from selling tiles to any dealers in California who were not members of the combination. It will be observed that in this case the contract or combination did not merely restrain the Eastern manufacturers from competing among themselves, as in the case of the Addyston Pipe Company, but it prevented all dealers in California, except those who were parties to the combination, from purchasing tiles from the Eastern manufacturers. It could be said, therefore, that the effect of the combination was to hinder or restrain the public generally in the transaction of interstate commerce.

In the case of the Northern Securities Company the precise question was whether a combination to acquire and hold a majority of the stocks of two railroad companies, the lines of which constituted main arteries of interstate commerce, and to create a community of interest in their ownership, was in restraint of commerce within the meaning of the Anti-Trust Act and could be prohibited by Congress. The ultimate effect of the combination in this case, undoubtedly, was to destroy the possibility of true competition between the owners of the two railroad properties, because the combination (*i. e.*, the Northern Securities Company) became the principal owner of both properties and acquired full control over their management. If, as decided in previous cases, a contract or combination suppressing competition between railroad companies in respect of interstate commerce is in restraint of interstate commerce and illegal under the Act, the majority of the court were right in holding that the combination in the case of the Northern Securities Company was illegal. In the prior cases the restraint of competition was only partial, while in this case the possibility of true competition was destroyed. The case, however, cannot fairly be distinguished from the case of E. C. Knight Company on the ground that the restraint of commerce in the one case was direct and in the other case indirect. The true distinction

[1] 193 U. S. 38.

is that in the one case the combination restricted only competition between individual shippers and did not affect the public in the transaction of interstate commerce, while, in the other case, the combination imposed a restraint upon the transaction, by the public, of interstate commerce upon railroad lines, which Congress had power to keep open, at all times, as avenues of interstate commerce.

The Anti-Trust Act does not purport to prohibit acts in restraint of commerce performed under contracts or by combinations, but it prohibits the contracts or combinations themselves, if in restraint of commerce. It was, therefore, not necessary to show that any action was taken by the Northern Securities Company to advance rates or otherwise to hinder commerce upon the two railway lines. Assuming that a restraint of competition among interstate railway carriers is a restraint of commerce, as was held in the case of the Joint Traffic Association, a combination to acquire absolute power over competitive rates would, properly speaking, be "in restraint of commerce" though rates should not actually be advanced. Similarly, a government with autocratic powers would be said to be in restraint of liberty although it should be a benevolent autocracy and should not exercise its powers oppressively.

Mr. Justice White and the three justices who concurred in his opinion, appear to have assumed that the case of the government was based upon two propositions, viz.: (1) That the ownership of stock in two railroad corporations constituted interstate commerce if the railroad companies themselves were engaged in interstate commerce; and (2) that the authority of Congress to regulate interstate commerce embraced the power to regulate the ownership of property used in interstate commerce, including power to regulate the ownership of stock in corporations whenever such corporations were engaged in interstate commerce.[1]

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[1] Mr. Justice White used the following language:—

"The proposition upon which the case for the government depends then is that the ownership of stock in railroad corporations created by a state is interstate commerce, wherever the railroads engage in interstate commerce. . . ."

"Does the delegation of authority to Congress to regulate commerce among the States embrace the power to regulate the ownership of stock in State corporations, because such corporations may be in part engaged in interstate commerce?"

"But the principle that the ownership of property is embraced within the power of Congress to regulate commerce, whenever that body deems that a particular character of ownership, if allowed to continue, may restrain commerce between the States or create a monopoly thereof, is in my opinion in conflict with the most elementary con-

The case of the government does not appear to have involved either one of these propositions, whatever may have been claimed in the arguments. The Anti-Trust Act prohibits only contracts, combinations, and conspiracies in restraint of commerce, and it does not purport to deal with the ownership of property in any respect. It is the act of contracting, combining, or conspiring in restraint of interstate commerce that is prohibited, and the relief sought by the government was not to regulate the ownership of property, but to restrain the continuance of a contract, combination, or conspiracy that operated in restraint of interstate commerce. While Congress was not vested by the constitution with power to regulate the ownership of stock in state corporations, or the ownership of any other property, merely because used in interstate commerce, Congress was empowered to prohibit obstructions and restraints of interstate commerce; and the power of Congress to prohibit persons from contracting, combining, or conspiring to obstruct or restrain interstate commerce would not fail merely because the contract, combination, or conspiracy was to be carried into effect through an acquisition of stock or other property.

Victor Morawetz.

New York, May 3, 1904.

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ceptions of rights of property. For it would follow if Congress deemed that the acquisition by one or more individuals engaged in interstate commerce of more than a certain amount of property would be prejudicial to interstate commerce, the amount of property held or the amount which could be employed in interstate commerce could be regulated."

". . . in this case the sole question is whether the ownership of stock in competing railroads does involve interstate commerce."

"In other words, the contention broadly is that Congress has not only the authority to regulate the exercise of interstate commerce, but under that power has the right to regulate the ownership and possession of property, if the enjoyment of such rights would enable those who possessed them if they engaged in interstate commerce to exert a power over the same. But this proposition only asserts in another form that the right to acquire the stock was interstate commerce."

FORGED TRANSFERS OF STOCK: ANOTHER VIEW.

THE Supreme Court of Massachusetts decided, in Boston Co. *v.* Richardson,[1] that one who surrendered a share-certificate bearing a forged transfer, and obtained in exchange a new certificate, must not only return the new certificate but also pay damages to the company, although he bought the old certificate from his transferor and received the new one from the company in ignorance of the forgery. This liability of the innocent purchaser was based upon his implied representation or warranty of title, the court finding an analogy between the presentment of the certificate to the company for the purpose of substituting the purchaser in the place of the former registered shareholder, and the transfer of a certificate to a third person by way of sale. In an article upon "The Doctrine of Price *v.* Neal," in a previous volume of the REVIEW,[2] the present writer questioned the soundness of this analogy. He agreed that, as between the company and the innocent purchaser, the loss, to the extent of the value of the shares, must fall upon the purchaser,[3] but maintained that this resulted not from any obligation *ex contractu* to the company, but indirectly from his liability *ex delicto* to the registered owner, whose signature had been forged. The argument was as follows. The assumption of dominion over the certificate by the purchaser, who claimed under the forged transfer, however honest his conduct, was a plain conversion. The registered owner, therefore, had an election of remedies. He might sue the innocent purchaser in trover, or he might ignore the purchaser and assert his unchanged rights as a shareholder against the company. If he collected the value of the shares from the innocent purchaser, that was practically the end of the matter. He could not, after receiving the equivalent of the shares from the converter, claim also the shares themselves as against the company. By electing to get satisfaction from the converter he determined his right

[1] 135 Mass. 473.

[2] 4 HARV. L. REV. 297.

[3] This was the result in Brown *v.* Howard Co, 42 Md. 384, and Metropolitan Bank *v.* Mayor, 63 Md. 6.

against the company. The converter, therefore, after satisfying the judgment against him, would succeed to the rights of the former owner of the shares. But the loss rests upon him, for he has paid twice for the shares.

If, on the other hand, the former owner, instead of proceeding against the converter, elected to claim reinstatement as shareholder upon the books of the company, the claim against the converter was not extinguished. He was still bound to make satisfaction for his tort, but the owner of the converted certificate, electing to continue the dominus of the shares, could not collect for his own benefit from the converter. On principles of obvious justice he must hold the claim against the converter as a constructive trustee for the benefit of the company. It is on the same principle that one who has received the amount of a loss by fire from an insurance company holds for the benefit of the company a claim against a third person, who wilfully or negligently caused the destruction of the property insured. In any event, therefore, and quite independently of any doctrine of representation or warranty, the innocent purchaser and not the company must be the victim of the forged transfer. Similar reasoning, it was suggested, explained why the loss must, in any event, fall upon the innocent purchaser of a bill, claiming under a forged indorsement, even though it might have been paid to him.

Convincing as this reasoning was to the writer, he was unable to find any decisions upon forged transfers of stock which supported it. Recently, however, the Court of Appeal in England, in Sheffield Corporation *v.* Barclay,[1] declared, reversing the decision of Lord Alverstone, C. J.,[2] that one who presented a forged deed of transfer of shares to a company for the purpose of being registered as a shareholder made no representation as to the genuineness of the transfer and was not liable to the company either upon a contract of indemnity or upon a warranty.

In an article upon "Forged Transfers of Stock and the Sheffield Case," which appeared in the April number of the current volume of the REVIEW, this decision of the English Court of Appeal is criticised adversely, not only for its *ratio decidendi*, but also for its supposed inconsistency with the decision of the same court in Oliver *v.* Bank of England,[3] and with the affirming decision of the House of Lords in the same case, *sub nom.* Starkey *v.* Bank of

[1] [1903] 2 K. B. 580. [2] [1903] 1 K. B. 1. [3] [1902] 1 Ch. 610.

England.[1] Although recognizing, as every reader must recognize, the clearness and force with which this criticism is expressed, the present writer finds it impossible to agree with the learned critic upon either of his grounds of objection to the English decision, and he is moved, accordingly, to suggest certain distinctions and analogies which, it is hoped, may be helpful in bringing about a correct determination of the rights and liabilities growing out of forged transfers of stock.

We may consider first the alleged inconsistency of the two English decisions. Obviously the Court of Appeal in the Sheffield Case was unconscious of any change of front or of any disregard of the controlling judgment of the House of Lords in Starkey's Case. That case was cited in the Sheffield Case by the defendant's counsel and distinguished by the counsel for the plaintiff, but is not mentioned in any of the three judgments of the Lords Justices. Doubtless these judges shared the declared opinion of Lord Alverstone,[2] whose judgment they reversed, that Starkey's Case was irrelevant to the question then before the court. An examination of the facts of the two cases, it is conceived, justifies this opinion.

In Starkey's Case the controversy related to consols, the transfer of which must be made at the Bank of England, and is executed, not by an officer of the Bank, but by the transferor in person or by his duly authorized attorney. Starkey, a broker, having received a power of attorney to sell and transfer shares belonging to F. W. Oliver and E. Oliver, which purported to be signed by both, whereas E. Oliver's signature was forged by F. W. Oliver, went to the Bank, produced the power of attorney, signed the demand to act[3] indorsed on the power, and executed as "attorney"[4] the transfer to the purchaser in the books of the Bank,[5] the Bank permitting him to act for Oliver as the latter's agent. On these facts it was decided that the case was governed by the familiar doctrine of Collen *v.* Wright,[6] that one who purports to act as the agent of another in dealing with a third person warrants that he has authority so to act.[7]

[1] [1903] A. C. 114.
[2] [1903] 1 K. B. 18.
[3] "I demand to act by this letter of attorney." [1902] 1 Ch. 611.
[4] [1902] 1 Ch. 612.
[5] [1902] 1 Ch. 629.
[6] 8 E. & B. 647.
[7] Cozens-Hardy, L. J., suggested, [1902] 1 Ch. 616, another principle upon which the Bank might charge Starkey: "Would the brokers [Starkey & Co.] have any answer

In the Sheffield Case, on the other hand, the subject of transfer to Barclay, the innocent purchaser, was stock of the Corporation of Sheffield. Such stock is transferable only by a deed of transfer, a separate instrument from the certificates, which may or may not be delivered with the deed.[1] The grantee sends the deed to the corporation with a request for registration and the issue of a new certificate to him or his nominee, and the corporation is under a duty to the registered owner to register all genuine transfers made by him. This course was pursued in the Sheffield Case, but, unfortunately, the deed of transfer to Barclay was forged.

The difference between the two English cases is sufficiently clear. The transfer on the books in favor of Barclay was not the act of the former owner, or of his attorney, as it was in Starkey's Case, but the act of the corporation. Barclay, unlike Starkey, did not purport to the corporation to be acting as the agent of the registered owner, but for himself. When he sent the deed of transfer for registration, he presented what purported to be an order upon the corporation from the registered owner to substitute the grantee in his place as shareholder, just as the holder of a bill presents to the drawee what purports to be the order of the drawer to pay to the holder the amount of the bill. Confessedly the holder of a bill makes no representation or warranty that the signature of the drawer is not forged. It is difficult to see any distinguishing circumstances in the Sheffield Case, which justify the implication of any representation or warranty of the genuineness of the deed, that is, the order of transfer. The holder of the bill and the holder of the order of transfer are not in the attitude of sellers, who, of course, do warrant their title. On the contrary, they are calling upon the drawee and the corporation, respectively, to do their duty and to decide for themselves, and at their peril, the extent of their duty. They say in effect, "I hold a bill, or an order of transfer of stock, which I believe to be genuine, and which by its tenor directs you to pay me so much money, or to register me as shareholder. Obey or disobey this direction as you see fit, and at your own risk, whatever be your decision." This analogy between the position of Barclay and the holder of

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to an action by the plaintiff [Oliver] to recover the purchase money of the stock [sold by Starkey & Co. to others]? And, if so, ought not the Bank, who have paid the plaintiff, to be subrogated to his right against the brokers?" This suggestion seems to be sound.

[1] They were not delivered to Barclay. [1903] 2 K. B. 590.

a bill upon which the drawer's signature was forged, was pointed out by Vaughan Williams, L. J.[1] The learned critic of the Sheffield Case characterizes the rule founded on Price *v.* Neal,[2] which protects the holder who has received payment of a bill on which the drawer's signature was forged, as anomalous. This seems hardly the adjective to apply to a rule which prevails throughout the British Empire, almost everywhere in the United States, and all over the continent of Europe. A rule so universal must be based upon a fundamental principle of justice. This principle may be stated as follows: If one of two innocent persons must suffer by the misconduct of a third, and their claims in point of natural justice are equally meritorious, the law will not intervene between them to shift the loss from one to the other. The continental decisions in cases like Price *v.* Neal are put clearly upon this principle, which was also, as it seems to the writer, the paramount reason for Lord Mansfield's judgment in this leading English case.[3]

It may be asked why the forged transfer in the Sheffield Case is not like the forged indorsement of a bill, in which case, as is well known, the innocent purchaser claiming under the forged indorsement must lose even if he has collected the bill, the law compelling him to refund the money.[4] Or, to put the question in another form, why is not the reasoning in the opening paragraphs of this article, by which the innocent purchaser of the share certificate, bearing a forged transfer, must suffer the loss to the extent of the value of the shares in cases like the Massachusetts case of Boston Co. *v.* Richardson,[5] equally cogent to the prejudice of Barclay in the Sheffield Case.

The answer is simple. The analogy fails between the Sheffield Case and the forged indorsement of a bill and between that case and the Massachusetts Case, because Barclay, unlike the innocent purchaser of the bill or certificate, was not guilty of a conversion

[1] [1903] 2 K. B. 590. Lindley, J., pointed out the same analogy in Simm *v.* Anglo-American Co., 5 Q. B. D. 196.

[2] 3 Burr. 1354.

[3] Unfortunately Lord Mansfield gave as another reason for his judgment the duty of the drawee to know the drawer's signature. The learned reader will find in 4 HARV. L. REV. 297 a statement of the writer's reasons for believing that the inability of the drawee to recover in cases like Price *v.* Neal does not depend upon any artificial theory of negligence nor upon the fictitious presumption that he knows the signature of the drawer.

[4] See cases cited in 4 HARV. L. REV. 307, n. 3.

[5] 135 Mass. 473.

of any document belonging to the person whose signature was forged. The latter's share-certificate was not delivered to Barclay.[1] Since, then, the true owner of the shares had no money claim against him, the corporation could not charge him indirectly by the principle of subrogation.[2]

James Barr Ames.

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[1] [1903] 2 K. B. 590.

[2] Had Barclay retained the new certificate he might have been compelled to surrender it, not because he had gained it by a tort, but simply in order to protect the corporation. In spite of the registration in his favor, he was not in truth a shareholder, and the new certificate was therefore merely a representation, which could not operate as an estoppel in his favor, for he had not changed his position upon the faith of it, but which would charge the corporation by way of estoppel in favor of a *bona fide* purchaser, to whom Barclay might transfer it. Such a transfer, if made by Barclay after knowledge of the forgery, would be wrongful, and the corporation would be entitled, on the principle of *quia timet*, to the surrender of this document, of no value to Barclay and a possible source of mischief to the corporation. The corporation was also interested in having the outstanding certificates correspond to the registration of shareholders on its books.

THE GAGE OF LAND IN MEDIEVAL ENGLAND.

ECONOMIC and legal development in England is, in certain of its grand outlines, strikingly illustrated by the history of forms of security on property. One sees in England the gradual advance from a natural to a money and credit economy, the progress from the rural and agricultural life of Anglo-Saxon times to the town and national life, with its industry and its commerce, of the centuries that follow the coming of the Danes and the Normans. A heathen and tribal society gives way to Christian and to feudal institutions; and at the same time there is early developed a strong kingship, a strong central government, that is to influence in a masterful way the course of economic and legal history down to our own day. Acting as a check on the growth of local custom and of feudal justice, and making the towns subserve its own economic purposes, this powerful central government has its foreign and commercial policy and its system of Common Law and Equity, with the good right arm of judicial execution to enforce the decrees of its courts.

Unless we err, the English law of gage, like the law of other Germanic countries, starts from the conception, in the Anglo-Saxon days of barter and self-help, that the *wed* or *vadium* delivered to the gagee is a provisional satisfaction, a provisional payment, a redeemable forfeit. The *res* and the claim are regarded as equivalent; and, should the gagor not redeem, the gagee must look exclusively to the *res* for satisfaction. The gagee has no personal action against the gagor; and the gagor, should he fail to redeem the *res*, has no right to the surplus, if the *res* be worth more than the amount of the gagee's claim. This forfeit-idea is the original idea underlying the *wed*, and this conception persists. In course of time, with the development of credit and of judicial execution, of varieties of obligation and of forms of action for their enforcement, there branch off two other ideas: (1) the idea that a *res* of trifling value may be given as a binding contractual form,[1] and this at length develops in the English ecclesiastical courts into the

[1] *Cf.* Thayer, Evidence at the Common Law 393.

formal contract by pledge of faith; and (2) the idea that, if the *res* be of substantial value, it is merely a collateral security to a personal claim, the gagee being entitled to sue the gagor personally and the gagor having a right to call the gagee to account for the surplus.[1] Along with this transformation of the primitive forfeit notion into the idea of collateral security there is another line of development that must be most carefully distinguished therefrom. Inasmuch as the early gage transaction is merely a provisional payment, the property right of the gagee on default lacks the *Auflassung*, the quit-claim, the final abandonment of all right in the *res* that is in Germanic law necessary to a complete and absolute title. The gagee cures this defect by going into court and getting the court to declare his title absolute; and, later, by getting the gagor in advance to put a *resignatio*-clause in the deed itself. By such a clause, however, the gagee evades the obligation that the law has at length imposed upon him of returning the surplus; and the law enters and forbids this evasion.[2]

It lies beyond the scope of the present paper to prove, by a discussion of English texts, that this has been the course followed by our own law. Keeping in mind, however, the outlines of this general Germanic development, we wish merely to distinguish as clearly as possible the various forms assumed by the English medieval gage of land. A consideration of the many difficult questions connected with the law of securities on land, not only in its historical development, but also in its present-day application to concrete cases that come before the courts, will, it is believed, be rendered all the easier by such a preliminary survey, rapid and inadequate though it be.

It helps to make the various medieval forms stand out sharply, if we group them into gages with immediate possession of the creditor, and gages with possession of the debtor until default; and this is indeed but the fundamental distinction that underlies

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[1] On *Schuld* and *Haftung* compare von Amira, Nordgermanisches Obligationenrecht (Altschwedisches Obligationenrecht [1882]) 22–42, and (Westnordisches Obligationenrecht [1895]) 56 *et seq.*; 2 Brinz, Pandekten (1879) 1 *et seq.* See also 1 Chironi, Trattato dei privilegi, delle ipoteche e del pegno (1894) 1 *et seq.*

[2] For the details of this view of the Germanic development in general, but without a consideration of the English texts, see 2 Heusler, Institutionen des deutschen Privatrechts 128–153, 225–250; Wigmore, The Pledge-Idea, 10 HARV. L. REV. 321–341 (citing, in his discussion of the historical significance of the "release" and "quit-claim," Professor Ames' essays on Disseisin, 3 HARV. L. REV. 23, 313, 327, unfortunately not accessible to the present writer during the preparation of this article). Compare also Wigmore, The Pledge-Idea, 11 HARV. L. REV. 29.

the *fiducia* or the *pignus* and the *hypotheca* of Roman law,[1] the *aeltere Satzung* and the *juengere Satzung* of German law,[2] the *engagement* and the *obligation* of French law.[3]

Then, looking at execution or the enforcement of the security, we may make several further distinctions. If we adopt for the moment — and it will tend to clearness — the terminology of German legal science, we may classify English forms of security on land with immediate possession of the creditor as usufruct-gage (*Nutzpfand*) and as property-gage (*Proprietaetspfand*). In forms of usufruct-gage the creditor has merely a right to take the rents and profits. In forms of property-gage the *res* itself, either by forfeiture or by sale, may be made to answer the claim of the creditor; if by forfeiture, whatever the value of the land may be, we may call the security a forfeiture-gage (*Verfallspfand*), and if by sale, with a return of the surplus proceeds to the debtor, the security may be designated as a sale-gage (*Verkaufspfand*). There may indeed be combinations of the usufruct-gage and the property-gage; and every property-gage with immediate possession of the creditor necessarily involves a temporary usufruct-gage, a right to take the rents and profits until the debtor's default.[4] Speaking now only for the English medieval law, we believe that gages where the debtor remains in possession until default may also be classified, according to this same principle, as usufruct-gage and as property-gage. In other words, whether the creditor take possession immediately or only on the debtor's default, what the debtor has in reality gaged are either the rents and profits of the land or the property, the *res*, itself. Finally, from these forms of security proper, where the creditor's claim may be satisfied, in one way or another, out of the gaged land, we may sharply distinguish cases where all the right the creditor has is to hold the land as a distress, as a *simplex namium*, as a means of bringing compulsion to bear on the debtor; for here the creditor has no right to take the fruits of the land and no right to obtain the land itself, either on the

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[1] See 1 Dernburg, Pfandrecht 1–95.

[2] See von Meibom, Das deutsche Pfandrecht; Brunner, Grundzüge der deutschen Rechtsgeschichte 188–191.

[3] See Franken, Das französische Pfandrecht im Mittelalter 1–36; Viollet, Histoire du droit civil français (1893) 733–748.

[4] On the medieval law on the continent see especially Franken, Das französische Pfandrecht im Mittelalter 207, 208; and Brunner, Grundzüge der deutschen Rechtsgeschichte 188–191. Compare also Beauchet, Histoire de la propriété foncière en Suède (1904) 424 *et seq.*

principle of forfeiture or of sale. Let us first examine briefly the gage with immediate possession of the creditor and then pass on to the gage with possession of the debtor.

I.

Forms of security on land with immediate possession of the creditor are, then, either usufruct-gage or property-gage; or, indeed, combinations of the two.

Both the usufruct-gage and the property-gage are found in the law of the Anglo-Saxon period;[1] but it is with the law of the centuries succeeding the Norman Conquest that we are here concerned.

The usufruct-gage assumes two forms, the form depending upon the use that is made of the rents and profits taken by the gagee while the land is held by him. The transaction is a *vivum vadium* if the parties agree that the rents and profits shall reduce the debt. The transaction is called a *mortuum vadium* if, on the other hand, the rents and profits do not reduce the debt itself, but are taken in lieu of interest.[2]

Glanvill states positively that the *vivum vadium* is a valid transaction; and apparently he means also that the king's court enforces the terms of the *mortuum vadium*. The Christian creditor, however, commits a sin in entering into a contract of *mortuum vadium* because it is a sort of usury; and if he dies before the contract comes to an end, he dies as a sinner and his chattels are forfeited to the king. To all seeming the *mortuum vadium*, sinful though it be, is the usual contract of the thirteenth century both for Christian and for Jew alike.[3]

From the usufruct-gage proper must be distinguished the so-called "beneficial lease," a lease for years purchased outright for a sum of money. This latter transaction serves in the twelfth and thirteenth centuries two important economic ends: It provides the

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[1] See Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunde 194–198; Kohler, Pfandrechtliche Forschungen 95, 96. Compare Lodge, The Anglo-Saxon Land Law, Essays in Anglo-Saxon Law 106, 107.

[2] Glanvill, X. 6, 8. Compare 1 Robbins, Law of Mortgages (1897) 1–5; Fisher, Law of Mortgage (1897) 4–7; 3 Gray, Cases on Property 411, n. 1. The English *vivum vadium* corresponds, therefore, to the German *Todsatzung* and the English *mortuum vadium* to the German *Zinssatzung*.

[3] Glanvill, X. 8; 2 Pollock and Maitland, Hist. Eng. Law (1898) 119. The principle of the *vivum vadium* is found in Madox, Formulare, No. CXLII. Compare Round, Ancient Charters, No. 56.

lessor with ready money, and it provides also a form of investment of capital that enables the lessee to speculate on the return of his money with interest out of the profits of the land. There is here no gage in the sense of a security for some personal claim, because there is no debt. For the same reason there is no usury, and in an age when usury is a sin and when the goods of the usurer who dies in his sins are forfeited to the king, the beneficial lease is popular. The one who invests his money in a beneficial lease has too the termor's possessory protection; and at the end of the term the land goes back to the lessor.[1]

Coke discusses the *vivum vadium* of his day as a form of security where "neither money nor land dieth, or is lost";[2] and in modern law the principle of the usufruct-gage underlies the "Welsh mortgage" and "securities in the nature of Welsh mortgages." In these modern gages the fruits of the land may be taken in lieu of interest only or in reduction of both principal and interest.[3]

The property-gage of the Middle Ages is forfeiture-gage. It assumes two main forms: (1) either the gagee who is given immediate possession must wait until default of the debtor before he can acquire proprietary right; or, (2) the gagee is given proprietary right at once, though under the condition that, if the debt be paid at a certain day, the proprietary right of the gagee shall then come to an end. In either case default of the debtor results in immediate or ultimate forfeiture of the gaged land itself, whatever may be its value, in satisfaction of the debt.

The first of these two varieties of the forfeiture-gage seems to be the usual form in the days of Glanvill and Bracton.

Glanvill, in the tenth book of his treatise, is apparently discussing several forms of gage and combinations of these forms. The usufruct-gage may be *vivum vadium* or *mortuum vadium;* but to such a transaction there may be added the possibility that the land itself be forfeited.

The gage may be given for a term, and in such a case the parties may or may not include a clause of forfeiture in their contract. If they include such a clause, this express bargain must be strictly

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[1] 2 Pollock and Maitland, Hist. Eng. Law 111, 112, 117, 121, 122. Compare the *Rentenkauf* of the German Middle Ages. 1 Heusler, Institutionen des deutschen Privatrechts 338, 355, 375, 2 *idem* 150–153.

[2] Co. Lit. 205*a*.

[3] See 1 Robbins, Law of Mortgages (1897) 1–31; Pollock, Land Laws (1896) 133.

adhered to; this bargain being that, if at the end of the fixed term the debtor do not pay his debt, the gaged land shall then become at once the property of the creditor, to be disposed of as he wishes.[1] Here no judgment of the court is necessary. By operation of the clause of forfeiture, the gagee becomes suddenly seised in fee, with the freeholder's rights and remedies. On the other hand, the contract may contain no such clause of forfeiture; and here the creditor must go into court and there must be certain legal proceedings before the gaged land can be forfeited to him for the debt. These proceedings are as follows: When the debtor fails to pay at the end of the term, the creditor must sue him. The debtor is then compelled to appear in court in answer to a writ ordering him to "acquit" or redeem the gage. Once in court the debtor will either confess or deny the fact of gaging the land for the debt. If he confess it, he has thus, says Glanvill, confessed the debt itself; and he is ordered by the court to redeem the gage within a "reasonable" time by payment of the debt, the court at the same time declaring that, in case of default in payment at the end of this new period, the gaged thing itself shall become the property of the gagee and thus forfeited for the debt. Should, however, the debtor deny the gage for the debt, he may then acknowledge that the land in question is his property and offer some excuse for its being in the possession of the other party. Should he confess in court that the land is not his property, the creditor is at once allowed by the court to dispose of it as his own. If the debtor assert that the property in question is his own, but deny both the gage and the debt, the creditor must then prove both the debt and the gage of the specific property in dispute for this debt.[2]

If now the gage be given indefinitely or without a term, the creditor may at any time demand the debt. Apparently this means that the creditor can at any time go into court and get a judgment ordering the debtor to redeem within some fixed and reasonable period; the court at the same time declaring that, if the debtor fail to do this, the creditor may do anything he pleases with the gaged land, that is, that the land will on default be forfeited.[3]

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[1] Glanvill, X. 6. See also 1 Spence, Equitable Jurisdiction (1846) 600, 601; Chaplin, Story of Mortgage Law, 4 HARV L. REV. 8; 2 Pollock and Maitland, Hist. Eng. Law 120.

[2] Glanvill, X. 6–8. On the burden of proof see Chaplin, Story of Mortgage Law, 4 HARV. L. REV. 9.

[3] Glanvill, X. 8; 2 Pollock and Maitland, Hist. Eng. Law 120. On the equitable nature of certain features of this procedure in the king's court and their similarity to

Unless, therefore, the parties stipulate that the gage shall be a pure usufruct-gage, we see that, whether the gage be for a term or without a term, and whether the contract contain the forfeiture clause or not, the gaged land may be forfeited for the debt; the gage thus assuming the form of property-gage.

The possession of the gagee is called *seisina*, a *seisina ut de vadio*, but it is quite unprotected by any legal remedy. The gagor remains seised of his freehold, and, should some third person unjustly turn the gagee out of the land, it is the gagor who has the right to bring the possessory action of Novel Disseisin. The gagor, not the gagee, has indeed been disseised. Furthermore, if the gagor himself eject the gagee, the latter still has no remedy by which he can recover possession.[1]

Glanvill explains this by saying that what the creditor really has a right to is not the land, but the debt itself; and that, if ejected by the gagor, the gagee should bring an action of Debt, the court compelling the debtor to make satisfaction. This argument is, however, unsatisfactory; and the real reason why the gagee is not given possessory protection is to be sought elsewhere. As pointed out by Pollock and Maitland, the king's justices in the time of Glanvill are experimenting with the new possessory actions. They are agreed that the freeholder shall have the assize of Novel Disseisin; but they are not quite sure whether the gagee really and truly has a *seisina* that calls for protection. Influenced perhaps by theories of the Italian glossators as to possessory protection, they end in refusing the gagee a remedy.[2]

As soon as the debt be discharged or payment properly tendered, the gagee is under the duty of giving up possession to the gagor; and, should the gagee maliciously retain possession, the gagor may summon him into court by writ. If it be determined that the land is held as a gage and not in fee, it must be given up to the gagor.[3]

The creditor may enforce his personal claim by bringing the

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the "equity of redemption" and "decree of foreclosure" in the courts of equity at a later day, see Chaplin, Story of Mortgage Law, 4 HARV. L. REV. 9, 10; 2 Pollock and Maitland, Hist. Eng. Law 120.

[1] Glanvill, X. 11, XIII. 28, 29; 2 Pollock and Maitland, Hist. Eng. Law 120, 121. See further Chaplin, Story of Mortgage Law, 4 HARV. L. REV. 6, 7.

[2] Glanvill, X. 11; 2 Pollock and Maitland, Hist. Eng. Law 120, 121. See Bracton, f. 268.

[3] Glanvill, X. 6, 8–10, XIII. 26–30.

action of Debt. His right to the gage on default may be enforced by the foreclosure procedure we have just discussed.[1]

To all seeming the Glanvillian gage soon becomes obsolete owing to the failure of the king's court to protect the gagee's *seisina ut de vadio;* and indeed the attempt to treat the gagee's rights in the land as rights of a peculiar nature is soon given up, the gagee being now given some place among the tenants.[2]

In the age of Bracton the popular form of gage is a lease for years to the creditor, under the condition that, if the debt be not paid at the end of the term, the creditor shall hold the land in fee. During the term the gagee has the *possessio* or *seisina* of a termor, and this possession is protected by writ. On default of the debtor the fee shifts at once and without process of law to the creditor; the fee, the land itself, is thus forfeited for the debt.[3] Here we have a form of the property-gage very much like the Glanvillian gage for a term with clause of forfeiture; and indeed the chief difference is the protection thrown about the creditor's possession in the later form.

This early form of the property-gage, the gage of Glanvill and Bracton, is not, however, to be the basis of the later law. Legal theory of later times does not tolerate this thirteenth-century method of allowing a term for years, a "chattel real," to grow into a "freehold estate" on the mere fulfilment of a condition.[4] Indeed, the classical gage of English law is not a conveyance on condition precedent, but a conveyance on condition subsequent, the *mortuum vadium* or *mortgage* that is expounded by Littleton and the judges of the later common law.

This later form of gage is a conditional feoffment; the condition being one for redemption and defeasance on a specified day. The creditor acquires at once an estate in fee, though this freehold estate is subject to the condition. If the debt be paid on the day, the feoffor, that is, the debtor, or his heirs may re-enter; if not, the freehold estate of the feoffee, the creditor, is entirely freed

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[1] Glanvill, X. 6–8, 11, 12.

[2] 2 Pollock and Maitland, Hist. Eng. Law 120, 121.

[3] Bracton, f. 20, 268, 269; 3 Britton XV, §§ 2–7; Bracton's Note Book, pl. 889; Madox, Formulare, No. DIX; Cart. Guisborough 144; 2 Pollock and Maitland, Hist. Eng. Law 122. See also Round, Ancient Charters, No. 56; 1 Chron. de Melsa 303; Madox, Formulare, No. CCIII; Y. B. 21–22 Ed. I. pp. 125, 222–224.

[4] See Littleton, §§ 349, 350; Co. Lit. 216–218; 2 Pollock and Maitland, Hist. Eng. Law 122, 123.

from the condition, thereby becoming absolute.[1] In other words, the gage of the later common law is a property-gage, a form of forfeiture-gage; and at the same time there is combined with this forfeiture-gage a temporary usufruct-gage in the nature of the Glanvillian *mortuum vadium*, the rents and profits taken by the mortgagee in possession until the day of payment not going in reduction of the debt.[2]

Though the writers of the twelfth and thirteenth centuries do not discuss this form of the property-gage, probably because it falls under the general theory of conditional gifts, it is nevertheless found in the sources of the law long before the time of Littleton,[3] and its history seems indeed to reach back to a distant past.[4] Its transformation in modern times will be adverted to subsequently.

Harold D. Hazeltine.

BERLIN, March 29, 1904.

[*To be continued.*]

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[1] See Bracton's Note Book, pl. 458; Y. B. 20–21 Ed. I. p. 422; Y. B. 30–31 Ed. I. pp. 208–212; Madox, Formulare, Nos. DLX–DLXII, DLXIX, DLXXIX; Littleton, §§ 332–344. According to modern practice in England the mortgage takes the form of an absolute conveyance to the mortgagee, with an agreement on his part to reconvey when the loan is paid. See Ames, Specific Performance, 17 HARV. L. REV. 174.

An example of the mortgage for years will be found in Madox, Formulare, No. DLXXXIX. In this later form of gage for a term default results, not in forfeiture of the fee, as in the time of Bracton, but simply in forfeiture of the term. See note (1) to Co. Lit. 205 a.

[2] Franken, Französisches Pfandrecht 162, 163.

[3] See the authorities cited in note 1, *supra*.

[4] On a similar form of conditional conveyance for purposes of security in the Anglo-Saxon period see Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunde 194-198.

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COMBINATION BY COERCION. — The doctrine of Mr. Justice Holmes[1] that intentionally to injure another is a *prima facie* tort for which justification must be shown, has received such general acceptance in contemporary discussion that the chief question in the law of competition may, perhaps, now be said to be, what is a justification? It seems only a truism to say that whatever is a benefit to the public is a justification, and a statement in a recent Massachusetts case to that effect is therefore interesting only for its clearness. *Martell* v. *White et al.*, 69 N. E. Rep. 1085. But when that decision went further and held that the members of a manufacturer's association in bringing pressure to bear upon a fellow member, by means of heavy fines, for the purpose of forcing him not to deal with the plaintiff, were using business methods not beneficial to the public, it became of the greatest interest.

The advantages of competition are so well known that it seems but another truism to say that competition, by proper means, is a benefit to the public. That is to say, A can inflict intentional damage on B if it is done, (1) for a proper object, and (2) by proper means. It seems now to be clear that the object of competition in the broadest sense, viz., the advancement of one's own position in the "struggle for life," is completely a proper object. By far the greatest of recent services to this subject was rendered by Judge Holmes when he made that point clear.[2]

[1] Advanced in 8 HARV. L. REV. 1, and in dissenting opinions in Vergelahn *v.* Gunter, 167 Mass. 92, 104; and Plant *v.* Woods, 176 Mass. 492, 504.

[2] See dissenting opinions, *supra*. Where the object is improper, *e. g.*, the gratification of one's malice, there is an action. Walker *v.* Cronin, 107 Mass. 555; Delz *v.* Winfree, 80 Tex. 400.

The great controversy, however, comes with regard to the means. A, in order to advance his position in life, can carry his purpose with B by the use of any means not tortious *per se*. He can cut prices, refuse to work for B, or refuse to employ B, either in order to make B exchange his commodity on better terms, or in order to make B do some other non-tortious act for the benefit of A. And what A can thus do singly, he can persuade others to do with him in combination. In either case B has no action.[3] But it is believed that when by these acts A forces B against his will to join him in a conspiracy to use like methods towards C, C has an action against A, for the latter is using the methods of the boycott. There are three common classes of cases: (1) Where a trade-union forces a citizen of the community to combine with it in its action towards the plaintiff; (2) where a trade-union forces a master to conspire with it and discharge the plaintiff; (3) where a member of the same association or union is forced by heavy fines or other undoubted coercion to join the other members in boycotting the plaintiff. The principle in the three classes is identical. The first, which is the well-known boycott, has been declared to give the boycotted person an action;[4] the plaintiff has likewise, though with some hesitation, been allowed to recover in the second;[5] and the third class is now assimilated to the others by Martell *v.* White.[6] These decisions seem to warrant the suggestion that the view is coming to be that, while a competitor may use all means not tortious *per se*, forcing others to join a boycotting combination against the plaintiff is a means which, if not tortious *per se*, is at least in the same category. Nor is much argument needed to support so happy a result. That any individual or set of individuals should be able, by threats of damage, to construct of unwilling others a combination powerful enough to destroy whoever stands in the way of their private gain, is in the highest degree detrimental to society.

If this analysis is correct, there is still a troublesome question. As has been seen, A can persuade others to join him in his action towards his competitor. He can even offer special benefits as inducements to join him in turning against the other.[7] Thus in many cases will arise the difficult question whether B has been coerced or merely induced.[8] This, however, is a question of fact, and one which, it is arguable, might be left to the jury.

Cy-Pres. — In general the rule against remoteness, commonly termed the rule against perpetuities, has no effect on the construction of limitations of estates expressed in unambiguous language. An application of the *Cy-pres* doctrine, however, gives rise to one striking exception.[1] Where lands are devised to an unborn person for life, remainder to his children in tail, either

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[3] Bohn M'f'g Co. *v.* Hollis, 54 Minn. 223; Arthur *v.* Oakes, 63 Fed. Rep. 310.

[4] Casey *v.* Cincinnati Typo. Union, 45 Fed. Rep. 135; Barr *v.* Essex Trade Council, 53 N. J. Eq. 101; Quinn *v.* Leathem, [1901] A. C. 495.

[5] Plant *v.* Woods, *supra;* Lucke *v.* Clothing Assembly, 77 Md. 396; *contra*, Martell *v.* Victorian Miners Ass'n, 25 Austr. L. T. 40.

[6] Jackson *v.* Stanfield, 137 Ind. 592; Boutwell *v.* Marr, 71 Vt. 1, *accord.*

[7] Mogul Steamship Co. *v.* McGregor, [1892] A. C. 25.

[8] See Brown *v.* Jacobs Co. 115 Ga. 429, 449, distinguishing McCauley *v.* Tierney, 19 R. I. 255.

[1] See Gray, Rule against Perpetuities 386.

successively, or as tenants-in-common with cross-remainders, the remainders to the children are clearly bad by the rule against remoteness. To avoid the effect of this rule the limitations are construed as an estate tail in the unborn person.[2] This doctrine has not been confined to a succession of estates tail, however, but has been extended to successive life estates. Under a devise to an unborn person, remainder to his children for life as tenants-in-common, so to be continued in a descending line *per stirpes* for life with cross-remainders, the unborn person has been given an estate tail.[3] In a recent case the limitations were substantially these with the exception that no cross-remainders were limited, and none could be implied, since there was no devise over.[4] *In re Richardson*, [1904] 1 Ch. 332. The reasoning of the court in holding that the *Cy-pres* doctrine does not apply, and that the estates subsequent to those of the unborn person are bad because of the rule against remoteness, suggests an inquiry into the principles underlying this rule of construction.

The application of the *Cy-pres* doctrine to these cases is said to be justifiable, for thereby, provided no holder bars his tail, the estate will go as it would have gone under the testator's limitations. This, however, does not account for the application of the doctrine to limitations of life estates. In such cases, under the testator's limitations, all children of the unborn person would have taken life estates at the same time, while after the application of the *cy-pres* construction, the younger children have merely a possibility on failure of issue of the older children. The courts say that there should be a sacrifice of the testator's special intent, as regards the order of taking, to his general intent in regard to the persons who shall take.[5] No greater sacrifice is made, for, as a recent case shows, the rule is applied only where the exact persons are included who would have been included in the testator's limitations.[6] *In re Rising*, [1904] 1 Ch. 533. In addition the rule has been applied only where there were cross-remainders, express or implied, under the testator's limitations. In such cases each person had the possibility, if the other lines failed, of getting in the whole estate, and of passing it to his children. This was practically equivalent to the estate tail which he will get under the new construction. Though the order of taking is entirely departed from, yet the general scheme of the testator is preserved. The court in the Richardson case, however, clearly indicates that it regards the doctrine as applicable only when the life tenants would have taken in the same order under the testator's limitations, in which they will take under the estate tail. It would be altogether reasonable to thus confine the doctrine to cases in which the intention of the testator will be almost exactly accomplished. Its application to cases where the order of taking will be entirely changed seems, however, well established by the cases noted. The principal case, nevertheless, though distinguishable, since there were no cross-remainders, indicates a commendable tendency to confine the doctrine within its present limits.

PAROL EVIDENCE OF WRITINGS COLLATERAL TO THE ISSUE. — The general rule that parol evidence of the contents of a document is not admissible unless for some good reason the document itself cannot be produced,

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[2] Vanderplank *v.* King, 3 Hare 1.
[3] Parfitt *v.* Hember, L. R. 4 Eq. 443.
[4] 2 Jarman Wills, 6th ed., 1339.
[5] Jessel, M. R., in Hampton *v.* Holman, 5 Ch. D. 183, 190.
[6] Monypenny *v.* Deering, 2 DeG. M. & G. 143; Seaward *v.* Willcock, 5 East 198.

has two principal applications: (1) As applied to contracts and other solemn instruments drawn up by the parties to the suit, it appears to be a rule of law.[1] This is based on the fact that the parties having committed themselves to writing, any parol evidence concerning the transaction is immaterial and irrelevant. (2) As applied to writings generally, it is a rule of evidence, the basis being that a document is the best evidence of its contents and must therefore be produced if possible. It is often said, however, that this latter rule should not be enforced when the document does not constitute the gravamen of the action, and is therefore collateral to the issue.[2] Although such an exception has found much favor in the language of the courts, an examination of the cases shows that they could for the most part have been decided on other grounds.[3] They seem to fall into three classes: In the first class what is sought to be proved is really not the contents of the document, but some fact or status which the existence of the writing establishes. Thus oral testimony of written orders is admissible to show that the plaintiff was in the employ of the defendant;[4] and so of an insurance policy to show that the defendant was insured.[5] In the second class of cases the fact to be proved can be perfectly well established without the paper. The paper would indeed be evidence, but it does not follow that all other evidence should be excluded. A common instance of this occurs when a defendant is allowed to put in evidence of payment without producing or accounting for the receipt.[6] These cases cannot be regarded as exceptions to the general rule, for in the first class the contents of the paper are not involved and in the second the circumstances are such that the paper cannot be regarded as the best evidence.[7] The third class of cases cannot be explained on the ground that the rule is inapplicable, for in them the document is the best evidence, and its contents are involved. They may accordingly be considered as the only authority for the exception supposed to be based on the collateral nature of the document.[8] A case recently decided in the New York Court of Appeals raises the question as to the validity of an exception on this ground. A, in a suit for work done under a contract with B, was not allowed to put in oral testimony as to the contents of a written contract made by B with C, a third party, in order to show that the work for which payment was claimed was not covered by that contract. *Taft* v. *Little*, 178 N. Y. 127. If the exception is to be logically followed out, it would seem that the case must be wrong, for the contract, evidence of which was excluded, was not the foundation of the plaintiff's claim, but collateral thereto. Yet the decision is clearly in accord both with reason and authority.[9] It seems clear therefore that nothing can turn on the fact that the document is collateral. But while the theory commonly advanced seems inadequate, it is difficult to frame any comprehensive rule to take its place, and the justice of each decision on its facts leads to the conclusion that the question may be largely left to the discretion of the courts. Perhaps as a rough test it might be said that where the facts desired to be

[1] See 17 HARV. L. REV. 271.
[2] Sommer *v.* Oppenheim, 19 N. Y. Misc. 605.
[3] 1 Greenl. Ev., 16th ed., § 563 m.
[4] Engel *v.* Eastern Brewing Co., 19 N. Y. Misc. 632.
[5] People *v.* Goldsworthy, 130 Cal. 600.
[6] Berry *v.* Berry, 17 N. J. Law 440.
[7] Greenl. Ev., *supra*.
[8] Foster *v.* Cleveland, etc., Ry. Co., 56 Fed. Rep. 434.
[9] Vincent *v.* Cole, Moo. & M. 257; Buxton *v.* Cornish, 12 M. & W. 426.

proved can easily be established without the document, its production may be dispensed with. Where, on the other hand, proof without the document would be difficult and unsatisfactory, the court will require it in evidence.

THE DEFENSE OF COMMON EMPLOYMENT. — The rule that a servant cannot recover damages from his master for injuries received through the negligence of a fellow servant has usually been supported on the theory of assumption of risk. A servant is regarded as impliedly contracting to assume all the ordinary risks incident to his employment, and the chance of injury from his fellow servants is said to be one of these risks.[1] A recent Georgia case in holding that it was error to enter a non-suit on the ground that the injury done to the plaintiff, a minor, was caused by the negligence of a fellow servant, suggests that the general doctrine should not apply where the injured party is of such a tender age that he cannot be presumed to have understood or assumed this risk. *Evans* v. *Josephine Mills*, 46 S. E. Rep. 674.

If the defense of common employment is in fact based on the doctrine of assumption of risk, the limitation upon that defense which the court suggests, seems to follow of necessity, since it is well established law that a minor cannot be held to assume dangers which his undeveloped faculties are unable to perceive.[2] There is, moreover, some authority in accord with this view.[3] At least an equal number of decisions, however, reach a contrary result, on the ground that the fellow-servant rule is to be applied alike to adult and minor.[4] And in many cases where the express point is not decided the language of the court leads inevitably to the same conclusion.[5] When authority is in such conflict, it may be of service to examine the grounds on which the general doctrine is founded.

By the doctrine of *respondeat superior* the master is unquestionably liable for an injury to a third party occasioned by the negligence of one of his servants. Why that doctrine should not equally apply when the injured party happens to be another servant of the same master is by no means clear. Nor can it be wholly explained by saying that the servant assumes the risk, for why should he be regarded as assuming the risk of the negligence of another servant any more than the negligence of his master?[6] Confronted with these difficulties, many judges have admitted the impossibility of finding a satisfactory explanation of the rule, and have regarded it as an exception to the theory of *respondeat superior* arising from the necessity of the case,[7] and sanctioned by public policy.[8] Perhaps the obvious helplessness of the master in preventing such injuries among his servants, and the consequent hardships of throwing on him the burden of being their insurer, influenced the courts in adopting the rule.

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[1] Farwell *v.* Boston & W. R. Co., 4 Met. (Mass.) 49; Bartonshill Coal Co. *v.* Reid, 3 Macq. H. L. Cas. 266.

[2] Kehler *v.* Schwenk, 151 Pa. St. 505.

[3] Hinkley *v.* Horazdowsky, 133 Ill. 359.

[4] Craven *v.* Smith, 89 Wis. 119.

[5] Fiske *v.* Central Pacific R. Co., 72 Cal. 38; King *v.* Boston & W. R. Co., 9 Cush. (Mass.) 112.

[6] See dissenting opinion in Crispin *v.* Babbitt, 81 N. Y. 516.

[7] Crispin *v.* Babbitt, *supra*.

[8] Rogers *v.* Ludlow M'f'g Co., 144 Mass. 198; Louisville & M. R. Co. *v.* Lahr, 66 Tenn. 335.

Certain it is that the want of it was widespread, for the doctrine sprang up suddenly and almost simultaneously both in England[9] and America.[10] Taking public policy as the basis of the rule, it is hard to see how its arguments are rendered less cogent by the fact that the injured servant is a child of tender years. The Georgia case may be taken, however, as an illustration of the growing tendency in this country to restrict the operation of the fellow-servant rule.[11]

"VALUE" IN THE LAW OF NEGOTIABLE INSTRUMENTS. — Value sufficient to cut off equities is much the same in the law of negotiable instruments as it is in the law governing any other property. One who pays the purchase price, even though it is less than the face value, is a purchaser for value and entitled to recover the full face value of the instrument,[1] though some courts indeed hold that the purchaser can recover only as much as he has paid.[2] If, however, a partial payment only is made before notice, the holder may recover only so much as he has paid before such notice.[3] This is codified in the Negotiable Instruments Law.[4] A recent New York decision under this provision holds correctly that a bank, discounting a note and crediting the purchase price to the account of the transferrer, but receiving notice of an equity before it is drawn upon, is not a purchaser for value. *Albany Co. Bank* v. *Peoples', etc., Co.*, 30 N. Y. L. J. 2023 (N. Y. Sup. Ct., App. Div.). If the consideration given by the purchaser consists in a negotiable instrument which has already been negotiated, such purchaser would be a purchaser for value.[5] The same should be true even though the instrument given as consideration is not yet negotiated, unless its surrender is procured by the defendant, the maker of the first instrument, to prevent future negotiation. If it is already matured in the hands of the transferrer, since any subsequent holder of it would then take subject to all equities, the purchaser should not be deemed a purchaser for value.

A very material difference between negotiable paper and other property exists, however, in case of a transfer in payment of, or as security for, an antecedent debt. By the decided weight of authority a transfer of negotiable paper in payment of an antecedent debt is a transfer for value.[6] A common law consideration, by means of which to predicate value to the transferrer, was at first found, where the paper was payable at a future date, in the forbearance to sue on the old obligation until that date. This is, however, obviously lacking where the paper is payable on demand. The English case of Currie *v.* Misa[7] settled the matter by holding that the consideration consists, not in the forbearance to sue, but rather in the extinction of the old debt, which revives upon default of the instrument taken. In the case of a transfer as security, however, the New York case of Stalker *v.* McDonald,[8] held there was no transfer for value, and such is the weight of authority at

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[9] Priestley *v.* Fowler, 3 M. & W. 1.
[10] Murray *v.* S. C. R. Co., 1 McMull (S. C.) 385.
[11] Parker *v.* Hannibal & St. J. R. Co., 109 Mo. 362, 397.

[1] Lay *v.* Wissman, 36 Ia. 305.
[2] Holcomb *v.* Wyckoff, 35 N. J. 35.
[3] Dresser *v.* Railway Construction Co., 93 U. S. 92.
[4] Art. IV. § 54.
[5] Adams *v.* Soule, 33 Vt. 538.
[6] Swift *v.* Tyson, 16 Pet. (U. S.) 1.
[7] L. R. 10 Ex. 153.
[8] 6 Hill (N. Y.) 93.

common law. The United States Supreme Court[9] and several other courts have, however, reached the contrary result. Their attempt to find a consideration constituting value in the duty to present and give notice of dishonor seems illusory, and is obviously without foundation in the case of bearer paper. Commercial usage alone can be its justification. Several cases decided under the Negotiable Instruments Law to the effect that a transfer to secure an antecedent debt is a transfer for value[10] had encouraged the hope that the codification had effectually changed the rule so that all jurisdictions adopting this statute would be uniform on this point, as they are in the case of a transfer in payment of an antecedent debt. A New York case of last year, however, reaching the contrary result, has dispelled that hope. *Sutherland* v. *Mead*, 80 N. Y. App. Div. 103. This is probably contrary to the intention of the draughtsmen, but the blame must attach rather to the Act than to the court.

THE STANDARD OF CARE FOR CHILDREN. — It would obviously be unjust to judge the conduct of a child by the standards set for adults; it would be equally so to absolve him in every case from the consequences of his own negligence. An intermediate position has accordingly been taken, in most jurisdictions, requiring of infants the exercise of such care in avoiding injury as children of the same age of ordinary prudence are accustomed to exercise under the same or similar circumstances.[1]

In cases of contributory negligence two limitations upon this general rule have, however, been urged. Of these the first tends to restrict the scope of the rule. Thus it is assumed that infants *non sui juris* — that is, incapable in the judgment of the jury, of taking care of themselves — are not, in law, chargeable with the duty of exercising care to avoid injury.[2] It is difficult to support this position. To permit any individual who is capable of exercising care to be a heedless instrument of his own injury seems clearly at variance with the fundamental principle of the doctrine of contributory negligence. If, on the other hand, the theory is that all infants *non sui juris* are so devoid of judgment as to be incapable of negligence, that proposition is not true in fact. It can safely be asserted that experience teaches every child the danger of contact with various objects long before he may be termed *sui juris*. On such grounds the New York court lately decided that a refusal to instruct the jury that an infant *non sui juris* is answerable for his own negligence constitutes reversible error. *Atchason* v. *United Traction Co.*, 90 N. Y. App. Div. 571.

The second limitation referred to, and one which substantially alters the general rule, is suggested by a recent Georgia case. *Eagle & Phenix Mills* v. *Herron*, 46 S. E. Rep. 405. The court required of a child such care to avoid injury as his individual mental and physical capacity at the time fitted him to exercise. In testing the conduct of an adult, the law takes as a standard the case of the ordinarily prudent man under the circumstances, and declines to consider the personal equation.[3] It is hard to see why this refusal should not apply to children as well as to adults. Under similar circum-

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[9] Railroad Co. *v.* National Bank, 102 U. S. 14. [10] Payne *v.* Zell, 98 Va. 294.

[1] Cleveland Rolling Mill Co. *v.* Corrigan, 46 Oh. St 283.

[2] See Kitchell *v.* Brooklyn Heights R. R. Co., 6 N. Y. App. Div. 99; Hyland *v.* Burns, 10 N. Y. App. Div. 386.

[3] Holmes, The Common Law 108 *et seq.*

stances it seems reasonable to expect of most children of the same age a certain degree of prudence. Why, then, in analogy to the rule as applied to adults, should not such care be required of a child as is, under the circumstances, commensurate with his age? To demand less of a child whose mental and physical development has been slow, or more of the infant prodigy, would, it is thought, be an unwise departure from the settled policy of the law of negligence. Nor have all previous Georgia decisions upon this point been inconsistent with this view.[4] If these objections are sound, it follows that the limitations above discussed should not be adhered to. The general rule needs no limitation. Both in principle and on authority it seems to define the standard of care for children satisfactorily, in negligence and contributory negligence alike.

Right of Contribution in Pledged Stock Repledged. — A broker held stock belonging to three people. He had purchased certain stock for X on a margin; M had pledged other stock with him to secure a loan; and H had deposited still other stock with him for safe keeping. All the certificates bore assignments in blank. The broker pledged the whole amount as security for money advanced by T, who relied in good faith on the broker's apparent title. The broker became insolvent, and T sold the securities of M and X, thereby obtaining enough to repay the loan. M and X knowing these facts tendered the broker the amount of their debts. In such a case should H share the loss with M and X? The court held that H was entitled to his securities free and clear. *Tompkins* v. *Morton Trust Co.*, 91 N. Y. App. Div. 274.

There is no doubt that T could enforce the pledge against all the stock, because the blank assignments gave the broker an apparent title.[1] Further, any beneficial interest of the broker in such stock should be first exhausted, since the broker is the real debtor, and the one on whom the burden should ultimately fall.[2] The stock of M had been pledged to the broker for a loan. To the extent to which the broker had advanced money on that stock, he had a beneficial interest in it, and to that extent therefore the stock of M should rank as the broker's own. Similarly, X's stock being carried on margin would almost universally be regarded as pledged, and should be treated in the same way as M's.[3] Some courts, indeed, give the broker a greater interest in X's stock, and recognizing the custom of the business consider the broker authorized to repledge it without regard to the amount of his advance.[4] If such a custom is to be recognized, X's stock should be treated as the broker's own in repaying T's advance.[5] The better view, however, which is probably also the New York law, is that this custom should not be recognized.[6] Hence, after the beneficial interest of the broker is exhausted, there remain liable for any unpaid balance the beneficial interests of M and X and the stock of H, all alike wrongfully pledged.

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[4] See Western & A. R. Co. *v.* Young, 83 Ga. 512.

[1] McNeil *v.* Tenth National Bank, 46 N. Y. 325.
[2] Gould *v.* Central Trust Co., 6 Abt. N. C. 281.
[3] Markham *v.* Jaudon, 41 N. Y. 235; *contra*, Covell *v.* Loud, 135 Mass. 41.
[4] Willard *v.* White, 56 Hun (N. Y.) 581; Skiff *v.* Stoddard, 63 Conn. 198.
[5] Skiff *v.* Stoddard, *supra*.
[6] Douglas *v.* Carpenter, 17 N. Y. App. Div. 329.

It is submitted that the principle of contribution should be applied to this situation.[7] This principle does not depend on the consent of the parties, but has its foundation in the doctrine that in certain situations burdens should be equally shared. H should not profit by the chance that T sold the stock of M and X rather than his. The use of stock of M and X has increased the value of that of H by releasing it from the claims of T. Property of two has been used to release an obligation equally binding on that of a third, and the property of all should contribute. H, M, and X should therefore share *pro rata* according to their beneficial interests in the stock originally pledged.

It should be noted that it has been held that tender to the broker by M and X makes them rank with H, since tender terminates the broker's interest in their stock.[8] At the time of the repledge, however, H acquired the right to have the stock of M and X bear a certain portion of the burden. This right should not be impaired by any subsequent transaction in which he had no part, since all parties acted with knowledge of his rights. Under either view, however, the principle of contribution would still apply.

Suicide as a Crime. — That suicide is a crime under the English common law appears from the resulting forfeiture of an offender's goods; that this crime is, moreover, regarded as a form of murder appears from the line of cases holding that one who persuades another to kill himself is guilty either as principal or accessory to the crime of murder.[1]

The fact that no punishment by way of forfeiture of goods or otherwise is prescribed for the suicide under our law has given rise to the belief that suicide is not a crime. Expressions of various courts to this effect[2] are recorded even in jurisdictions in which the common law still prevails. On the other hand, in those same jurisdictions, one who accidentally kills another in an attempt to commit suicide is held for murder,[3] and one who persuades another to kill himself is guilty of the same crime either as principal or accessory.[4] The two positions taken by the courts seem irreconcilable. If suicide is not a crime it is hard to understand how one who persuades another to commit suicide is guilty of any crime. And if suicide is not murder it is hard to see how one who persuades to suicide can be accessory to murder. A Texas court,[5] after asserting that the suicide is innocent of violating the laws of that state, is at least consistent in making the further assertion that the party furnishing the means to the suicide must likewise be innocent.

In jurisdictions in which the common law has been entirely superseded by statute and the statutory definition of murder is not broad enough to comprehend suicide, the law on this point would seem to be finally determined; nevertheless, there exists the same tendency on the part of the courts, while holding the suicide himself innocent of any crime, to punish

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[7] McBride *v.* Potter-Lovell Co., 169 Mass. 7.
[8] Rhinelander *v.* National City Bank, 36 N. Y. App. Div. 11.

[1] Rex *v.* Dyson, Russ. & R. 523; Regina *v.* Allison, 8 C. & P. 418; Rex *v.* Russell, 1 Moo. C. C. 356.
[2] See Commonwealth *v.* Mink, 123 Mass. 422, 429.
[3] Commonwealth *v.* Mink, *supra;* State *v.* Levelle, 34 S. C. 120.
[4] Commonwealth *v.* Bowen, 13 Mass. 356.
[5] Grace *v.* State, 69 S. W. Rep. 529 (Tex., Cr. App.).

the abettor. In a recent Illinois case suicide was held to be no crime under the statutes of that state, and, therefore, no defense to recovery on a contract of insurance providing that the certificate should be void if the member died in consequence of a violation of the laws of the state. *Royal Circle* v. *Achterrath*, 68 N. E. Rep. 492. The same court in another case [6] suggests that, although suicide is no crime, the one who procures another to commit the act of self-destruction may be held liable as a principal to the crime of murder, on grounds somewhat analogous to the theory of agency in civil cases. But, since the agent's act for which the principal is to be held guilty is suicide, it follows that if this suggestion is correct suicide must be murder in spite of the court's express disaffirmation.

The foregoing seems to indicate that under our law suicide is no less criminal than under the English common law, but that the policy of our law in dealing with the suicide is radically different. No punishment is, in general, prescribed either for one who kills himself or for one who unsuccessfully attempts to do so, not because his act is not criminal, but because the futility of such measures in preventing future crime is now generally recognized.[7] These considerations, however, cannot be invoked to shield one who encourages, abets, or assists another in committing suicide, and he should, therefore, be punished as any other criminal. Although, under a code which makes no mention of suicide and which defines murder as the malicious killing of another, there may be no logical ground upon which the abettor can be held guilty of any crime, nevertheless, in jurisdictions in which the common law definition of murder still obtains, suicide may well be considered as one form of murder, and the abettor punished accordingly.

THE ENJOINING OF CRIMINAL PROCEEDINGS. — It is an ancient maxim that a court of equity will not restrain criminal proceedings.[1] Like most legal maxims, this assertion, though generally true, does not accurately represent the state of the law. In one case at least, equity freely enjoins criminal proceedings, that is, when the party instituting them is already a plaintiff in equity against the same defendant. In such a case the court of equity will not allow the criminal court to interfere with its jurisdiction to the annoyance of the defendant.[2] And in certain other cases an injunction has been allowed where the party instituting the criminal proceedings has not come into equity at all.[3] It must be admitted, however, that the courts appear to have adopted no general principles on which relief may be granted. About all that can be said is that the plaintiff must make out a sufficiently hard case. Still it is not impossible to get some idea of the considerations which should appeal to the court in the exercise of its discretion.

It would seem necessary, in the first place, to distinguish between *ex relatione* proceedings and cases prosecuted by an officer really acting in behalf of the state. In the first class of actions the officer is, in fact, redressing a private injury; in the second, he is trying to secure the

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[6] See Burnett *v.* People, 68 N. E. Rep. 505, 511 (Ill.).
[7] See 17 HARV. L. REV. 331.

[1] See Story, Eq. Jur. 13th ed., § 893; Lord Montague *v.* Dudman, 2 Ves. 396.
[2] Mayor of York *v.* Pilkington, 2 Atk. 302.
[3] Iron Works *v.* French, 12 Abb. N. C. (N. Y.) 446.

punishment of a wrong to the state as such. Here his duty to the state is so immediate that interference with him is practically an interference with the administrative arm of the government. To justify equity in acting here at all, we need an extremely strong case, and the plaintiff's conduct must be in no way immoral *per se*. Even then the interference should go no further than is necessary to prevent the officer from prosecuting in an unreasonable and unnecessarily damaging way. Thus where a number of prosecutions on the same facts are threatened, and it can be shown that irreparable damage will result from them, equity might enjoin all the proceedings save one, leaving that one to determine the controversy. Again, where the proceedings threatened are merely to impose a fine to enforce a tax, although no irreparable injury is shown, the avoidance of a multiplicity of prosecutions is also held enough to give equity jurisdiction.[4]

In those cases where the prosecution is at the instance of a private party, equity may well feel more free to act, although here again the plaintiff must come into equity clear of the charge of conduct in itself immoral. Given such a case, if it can be shown that irreparable injury will result from the criminal proceedings it would seem that equity ought to take jurisdiction and finally decide whether the plaintiff has committed an offense. It would be a stronger case for interference if only the validity of a statute were involved or the question whether certain admitted acts constitute an offense, since where there are issues of fact there is a strong feeling among judges that the best place to try them is before a jury. But even if facts are in dispute, it still seems as if the balance of advantages is in favor of taking jurisdiction in all cases where irreparable damage is threatened. On the other hand, if the damage is not irreparable, though great, and if issues of fact alone are raised, it would seem unnecessary to take the question from a jury; but where the acts complained of are admitted, and the only question is whether they constitute an offense, it would seem that a court of equity could decide the matter as well as a court of law. In that way the risk of damaging an innocent party would be avoided. In the case of *Greiner-Kelly Drug Co.* v. *Truett*, 79 S. W. Rep. 4 (Tex., Sup. Ct.), however, the court held that equity under these circumstances has no jurisdiction.

What Law Governs Usurious Contracts. — As a question of conflict of laws, two general rules have been adopted to determine what law governs usury in contracts. One, sustained by comparatively few jurisdictions, is that the contract is governed by the law of the place of contracting;[1] the other, the more generally accepted, is that the intention of the parties determines which law governs. The latter rule is, however, applied differently in accordance with two different rules of presumption. In some states the law of the place of performance is deemed the law intended, unless the actual intention to the contrary is shown.[2] The prevailing doctrine, however, is that, if by either the law of the place of contracting or of the place of performance the contract would be valid, the parties are pre-

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[4] Chicago *v.* Collins, 175 Ill. 445.

[1] Akers *v.* Demond, 103 Mass. 318.

[2] Bennett *v.* Building & Loan Ass'n, 177 Pa. St. 233.

sumed to have intended the favorable law.[3] If the contract is made and performable in the same state, the courts, reasoning from the facts that no other law could have been intended, generally feel obliged to hold that the law of that state governs.[4] It has, however, been held that, notwithstanding that law would make the contract usurious, still, if one party is domiciled in another state, where the contract would be valid, the law of the latter state is presumed to have been intended.[5] One important qualification upon the right to choose the governing law is that it must not be an attempt to evade the usury laws of the place of contracting.[6] On this ground the contract in a late case in the United States Supreme Court was held usurious. *Building & Loan Association* v. *Brahan*, 24 Sup. Ct. Rep. 532.

The cases show that, while the courts purport to follow the intention of the parties, they really follow their rules of presumption, unless, indeed, the parties have expressly stipulated what law shall govern. Even then, if the choice of the parties does not accord with the rules of presumption, the courts are likely to find that the parties have attempted an evasion. The prevailing doctrine, that the favorable law is presumably intended, illustrates most strikingly the fictitious character of the intention found. This presumption assumes, first, that the parties knew the law of the two jurisdictions; secondly, that they really intended the favorable law to govern. Obviously, most often neither fact actually exists. But the courts have seemed disposed to avoid the usury law, and consequently have treated the question as a subject apart. To gratify that disposition the adoption of an ingenious combination of the vague reasoning of Lord Mansfield in Robinson *v.* Bland,[7] to the effect that the intention of the parties determines what law governs the creation of their contracts, on the one hand, and the fictitious presumption that the favorable law is intended, on the other, has admittedly proved a serviceable device with which, to accomplish the desired, though somewhat questionable, result. The only proper rule, it is submitted, is the one first stated, that the law of the place of contracting governs. This, on sound theory, should be true of ordinary contracts,[8] and there is no reason why a different rule should be applied to usurious contracts. When acts are done within a jurisdiction it is difficult to see how rights can be raised on those acts except by that law which alone is in force in that jurisdiction. If the question were merely one of expediency, the long line of decisions to the contrary should perhaps remain unmolested; but if the objection stated is sound, the question is one of power, and therefore the courts should have no hesitation in overruling those decisions.

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[3] Miller *v.* Tiffany, 1 Wall. (U. S.) 298.
[4] Buchanan *v.* Drovers' Nat'l Bank, 55 Fed. Rep. 223.
[5] Scott *v.* Perlee, 39 Oh. St. 63.
[6] Meroney *v.* Bld'g & L. Ass'n, 112 N. C. 842.
[7] 2 Burr. 1077.
[8] See 16 HARV. L. REV. 58; and *infra*, p. 570.

AN OMISSION. — The case of Garst *v.* Hall & Lyon Co., 179 Mass. 588, should have been referred to in the NOTE entitled "Restrictive Agreements as to Chattels" which appeared in the April number. See 17 HARV. L. REV. 415. The case is an authority against the view there advanced.

RECENT CASES.

BILLS AND NOTES — PURCHASE FOR VALUE. — A bank discounted a note for the payee before maturity and credited the amount of the purchase price to his account. Before the account was drawn upon, the bank received notice of entire failure of consideration for the note. *Held*, that under the Negotiable Instruments Law the bank is not a purchaser for value. *Albany Co. Bank* v. *People's Co-Operative Ice Co.*, 30 N. Y. L. J. 2023 (N. Y. Sup. Ct., App. Div.). See NOTES, p. 563.

CONFLICT OF LAWS — JURISDICTION OVER TRUST CREATED ABROAD. — A domiciled Englishman married a Scotchwoman in Scotland. The wife's property, consisting mainly of heritable bonds, was put in settlement under Scotch law, a non-alienable, alimentary provision being made for the husband if he survived. The trustees were Englishmen. The husband survived and mortgaged his interest. The provision against alienation was valid by Scotch, but void by English law. The mortgagees claimed payment of the income. *Held*, that the settlement is governed by Scotch law, and therefore the mortgage is invalid. *In re Fitzgerald*, [1904] 1 Ch. 573.

This decision reverses the holding of the Divisional court in the same case, which was discussed in 17 HARV. L. REV. 123. The principal ground for the decision is that the property placed in settlement consisted chiefly of heritable bonds, which are regarded as immovables, and therefore to be treated like any other immovables in Scotland. The court also relied upon the fact that the settlement was drawn in Scotch form and subject to limitations valid only by Scotch law.

CONFLICT OF LAWS — LAW GOVERNING MAKING OF CONTRACTS. — A contract of insurance made in the state of Washington provided that it should be construed as if made in New York, but contained a stipulation for forfeiture and an express waiver of any statutory provision contrary to such stipulation. *Held*, that a New York statute forbidding such forfeiture is ineffectual to prevent the forfeiture. *Mutual Life Ins. Co.* v. *Hill*, U. S. Sup. Ct, Apr. 4, 1904.

The court has previously stated that, unless forbidden by statute or by the policy of the jurisdiction where the contract first becomes binding, the parties may agree that the law of the place of performance shall apply. *London Assurance* v. *Companhia de Moagens*, 167 U. S. 149, 161. In the absence of agreement, it has, according to the circumstances of different cases, presumed that the parties intended to adopt the law of the place of making, of the place of performance, or of either place which would uphold the validity of the contract. See *Pritchard* v. *Norton*, 106 U. S. 124, 136–137. The present decision establishes the propositions that the law of the place of making, here that of Washington, always governs, and that all stipulations or presumptions as to the applicability of other laws have only the force and effect of other ordinary provisions of the contract. Although contrary to what has hitherto been supposed to be the doctrine of the court, even by the United States Circuit Court of Appeals, it conflicts with no prior Supreme Court decision, and rests upon the sound principle that rights are created, not by will of the parties, but by law. See 3 Beale, Cases on Conflict of Laws, 540–541; *Mutual Life Ins. Co.* v. *Dingley*, 100 Fed. Rep. 408; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 462.

CONFLICT OF LAWS — WHAT LAW GOVERNS IN USURY. — A building and loan association domiciled in New York made a loan in Mississippi to a party in that state, the principal and interest to be payable in New York City. After having paid the interest, as stipulated, the borrower brought an action under a Mississippi statute to recover the interest paid on the loan, claiming that it was usurious. *Held*, that the contract is governed by Mississippi law, and hence the interest paid can be recovered. *Building & Loan Association* v. *Brahan*, 24 Sup. Ct. Rep. 532. See NOTES, p. 568.

CONSTITUTIONAL LAW — RIGHT OF EQUITY TO REGULATE CONFLICTING EASEMENTS. — The franchise of a trolley line gave it the right to cross the tracks of an existing steam railroad. A city, acting under its charter, passed an ordinance regulating the manner in which the trolley line should cross the railroad. The latter complained that such regulations were inadequate. *Held*, that a court of chancery may, under the Constitution of New Jersey, regulate the manner in which these conflicting easements

shall be enjoyed. *West Jersey, etc., Co.* v. *Atlantic City, etc., Co.*, 56 Atl. Rep. 890 (N. J. Ch.).

It seems to be well settled that a legislature by giving a franchise to a railroad company does not thereby preclude itself from later granting to another company the right to cross the tracks of the former, for every company may fairly be presumed to take its franchise subject to such a contingency. *Connecting Ry. Co.* v. *Union Ry. Co.*, 108 Ill. 265. But where by later enactment a legislature assumes to define the meaning of an earlier grant, it is usurping judicial functions. *Commonwealth* v. *Proprietors of New Bedford Bridge*, 2 Gray (Mass.) 339. Although there is nothing in the Constitution of the United States which forbids a state legislature from exercising such a power, the Constitution of New Jersey, like that of most other states, does contain such a prohibition. See *Satterlee* v. *Matthewson*, 2 Pet. (U. S.) 413; *cf. Boykin* v. *Shaffer*, 13 La. An. 129. Under such a provision, as the present case shows, the interpretation of a franchise, like the interpretation of any contract, is properly for the court alone; and where such franchise causes a conflict of easements over the same *locus*, equity, with its remedies by injunction and receivership, has inherent jurisdiction to settle the rights of the different parties.

CONTRIBUTORY NEGLIGENCE — STANDARD OF CARE FOR CHILDREN. — *Held*, that an infant, whether he be *sui juris* or not, is not in law excused from exercising such care as is commensurate with his years and intelligence in approaching and passing known objects and places of danger. *Atchason* v. *United Traction Co.*, 90 N. Y. App. Div. 571.

In an action to recover damages for the negligent injuring of a child by a defective machine the jury were instructed that if the plaintiff, by exercising such care as his mental and physical capacity at the time fitted him to exercise, could have avoided the injury, he could not recover; but if in the exercise of all his mental capacity he did not know the machine was dangerous, and the accident happened by means of the defect therein, he would be entitled to recover. *Held*, that the charge correctly states the law. *Eagle & Phenix Mills* v. *Herron*, 46 S. E. Rep. 405 (Ga.). See NOTES, p. 564.

CORPORATIONS — INCORPORATION BY TWO STATES — FORECLOSURE PROCEEDINGS. — A manufacturing company was incorporated in both Alabama and Georgia, but conducted all its business as if only one corporation existed. A mortgage was given to an Alabama mortgagee, and subsequently a foreclosure decree made by the federal circuit court for Georgia was followed by a sale. The company, which had not been served as an Alabama corporation, filed a bill for redemption in the Alabama state court. The purchaser at the foreclosure sale applied to the federal circuit court for Georgia to enjoin the Alabama action, joining as defendants citizens of the same state as the purchaser. *Held*, that the court lacks jurisdiction of the bill. *Alabama & Georgia Mfg. Co.* v. *Riverdale Cotton Mills*, 127 Fed. Rep. 497 (C. C. A., Fifth Circ.).

As other grounds of jurisdiction are lacking, the court could entertain the bill only if the relief sought were ancillary to the original foreclosure decree. *Root* v. *Woolworth*, 150 U. S. 401. It cannot be considered ancillary unless the original bill was one against the Alabama corporation. There is some argument for holding that it was, since a single corporation conducted all business transactions, and that corporation appeared in the foreclosure proceedings. The Alabama corporation was concededly bound by the mortgage, and all persons really interested were represented in the foreclosure. The great weight of authority is, however, that the corporate entity created by one state is to be regarded as distinct from that created by another, although the two habitually act as one. *Missouri, etc., Ry. Co.* v. *Meeh*, 69 Fed. Rep. 753. There are in law, therefore, two principals represented by the same agents, and if the foreclosure proceeding is to bind both principals, the agents should be served as the agents of both. As no sufficient reason appears for departing from the ordinary method of proceeding against a corporation, the majority view seems preferable.

CORPORATIONS — TRANSFER OF STOCK BY MARRIED WOMAN — ESTOPPEL. — A statute provided that a contract of sale made by a married woman with her husband should be invalid unless sanctioned by order of the court. The plaintiff, a married woman, owned stock in the defendant corporation. Without authority from the court she sold her certificates to her husband, who, accompanied by her attorney, went to the defendant and obtained new certificates, which he sold to a *bona fide* purchaser. The defendant throughout had no knowledge of her marriage to the first transferee. The plaintiff brought an action for dividends, and asked that new certificates be issued to her. *Held*, that the plaintiff has no cause of action. *Bigby* v. *Atlanta, etc., R. R. Co.*, 46 S. E. Rep. 827 (Ga.).

The decision rests on the ground that the plaintiff's shares are now, without any fault on the part of the defendant, held by a *bona fide* purchaser from whom the plaintiff could not recover them. But it is not necessary, in order to protect the *bona fide* purchaser, to say that he has acquired the plaintiff's shares. As in the case of a transfer void for forgery, it is sufficient for him that he purchased certificates issued by the defendant. The decision, however, may possibly be supported on another ground. When the defendant gave new certificates to the husband, its consideration was the surrender of the old certificates. It gave value to the husband in good faith for certificates really owned by the wife, but it did so in the belief that her husband was the owner. As the plaintiff both encouraged this belief and concealed her marriage to the transferee, she should not be allowed to profit by her wrong at the defendant's expense. *Cf. Dotterer* v. *Pike*, 60 Ga. 29.

DAMAGES — NEGLIGENT TRANSMISSION OF TELEGRAM — MENTAL SUFFERING. — The defendant company negligently transmitted a telegram sent by the plaintiff, causing her great mental suffering but no physical damage. *Held*, that this is an injury, sounding in tort, for which the plaintiff can recover. *Cowan* v. *Western Union Telegraph Co.*, 98 N. W. Rep. 281 (Ia.).

A recovery is allowed for mental suffering in cases of wilful or negligent injury where the mental pain is merely one element in the damages. *McKinley* v. *Chicago, etc., R. R. Co.*, 44 Ia. 314. There is a conflict of authority whether in cases of fright resulting in physical damage an action is allowed. When permitted, however, it is based on the physical injury caused by the negligence, and not on the intervening mental disturbance. *Purcell* v. *St. Paul City Ry. Co.*, 48 Minn. 134. In a few extreme cases courts have awarded damages, punitive in nature, for wilful injury to the feelings. *Lawson* v. *Chase*, 47 Minn. 307. Although the principal case ultimately relies upon an analogy with cases drawn from each of these classes, it is readily distinguishable from them, for the act complained of was negligent, not wilful, passive, not active, and the mental suffering was the sole basis of damages. The principal case, then, though following a previous Iowa decision, is a distinct extension of the ordinary tort liability, and the weight of authority is against it. *Chase* v. *Western Union Telegraph Co.*, 44 Fed. Rep. 554. *Contra*, *Mentzer* v. *Western Union Telegraph Co.*, 93 Ia. 752.

DEDICATION — ACCEPTANCE BY MUNICIPALITY — EFFECT. — The plaintiff's grantor was in 1850 the owner of an undivided half of land, now the site of Brookport. In that year the owners recorded an unacknowledged plat of this land with reference to which they sold lots along a strip designated as Water Street. This strip was used as a street both before and after the incorporation of the defendant, and the defendant expended money in its repair. The plaintiff filed a bill for partition of Water Street. *Held*, that the bill must be dismissed. *Owen* v. *Village of Brookport*, 69 N. E. Rep. 952 (Ill.).

The first reason given in denying the plaintiff any interest is that the title by dedication is in the defendant. In Illinois, as in many states, a statutory dedication passes the fee to the municipality; but in order to have this effect the requirements of the statute, one of which is the acknowledgment of the plat, must be fulfilled. *Lyman* v. *Gedney*, 114 Ill. 388. As there was no acknowledgment in the principal case, there was originally only a common law dedication giving the public an easement, but leaving the fee in the dedicators. *Banks* v. *Ogden*, 69 U. S. 57. The court, while admitting this principle, argues that when the defendant afterwards accepted this dedication, it acquired not only an easement but the title itself. This position seems unsound. An acceptance by the defendant would have passed the title had there been a statutory dedication, but as the requirements of the statute were not fulfilled, such acceptance could do no more than make the defendant the trustee of the easement already acquired and would have no effect whatever on the title. *Marsh* v. *Village of Fairbury*, 163 Ill. 401.

EQUITY — MANDATORY INJUNCTION — RES BEYOND THE JURISDICTION. — The complainant was entitled to water from a stream in Nevada. The defendant built a ditch in California which diverted the water from the stream to the injury of the complainant's rights. *Held*, that the United States Circuit Court in the district of Nevada has jurisdiction to enjoin such diversion. *Miller & Lux* v. *Rickey*, 127 Fed. Rep. 573 (Circ. Ct., Dist. of Nev.).

The court considered that since it had personal service on the defendant it could order him to alter his ditch. It is submitted that this jurisdiction should not be asserted. Courts universally refuse to send their own officers into other jurisdictions to abate nuisances or to partition land. *Mississippi, etc., R. R. Co.* v. *Ward*, 2 Black

(U. S.) 485; *Wimer* v. *Wimer*, 82 Va. 890. The same objections in general apply to requiring a defendant to do similar acts in a foreign jurisdiction. In either case the court is meddling with land in another jurisdiction, and can grant no protection to those executing its decrees. The United States Circuit Court would, in this particular, have no greater powers than a state court. *Northern, etc., R. R. Co.* v. *Michigan Central R. R. Co.*, 15 How. (U. S.) 233. It is true that equity may sometimes properly affect foreign lands indirectly, as by enjoining a trespass. *Great Falls Mfg. Co.* v. *Worster*, 23 N. H. 462. But where a plaintiff asks affirmative relief, most courts, on grounds of policy if for no other reason, would require that it be sought in the jurisdiction where the defendant is to act. *Stillman & Co.* v. *White Rock Co.*, 3 Woodb. & M. 538; *contra*, *Willey* v. *Decker*, 73 Pac. Rep. 210 (Wyo.).

EQUITY — TRUSTEE'S BILL FOR INSTRUCTIONS — CLAIM ADVERSE TO LEGAL TITLE. — The plaintiff, trustee of a mortgage to secure bonds, received from the mortgagor a fund for the payment of coupons. Before maturity of the coupons the defendant sued the mortgagor, and by notice to the plaintiff attached the fund in its hands. The defendant, although he had obtained judgment, refused after request by the plaintiff to levy on the fund attached. The bondholders demanded payment of their coupons. *Held*, that the plaintiff may maintain a suit in equity against the defendant alone to have the validity of his lien determined. *Holland Trust Co.* v. *Sutherland*, 69 N. E. Rep. 647 (N. Y.).

A bill of interpleader could not have been sustained, since one claim is to the legal title, the other to an equitable interest. The *res* is not the same. The court treated the action rather as a trustee's bill for instructions. It is generally said that such a bill will lie only if neither of the claims is adverse to the trust. *Greene* v. *Mumford*, 4 R. I. 313. Yet one case has been found in which equity gave relief where the settlor claimed that the trust deed had not been legally delivered. *Fraser* v. *Davie*, 11 S. C. 56. And the chief requisite for such jurisdiction is the existence of no other means of so determining rights as to protect the trustee from the risk of future liability. See *Bullard* v. *Attorney-General*, 153 Mass. 249. Certainly no such means exist here. The trustee company cannot successfully move to vacate the attachment. *Key West Ass'n* v. *Bank of Key West*, 18 N. Y. Supp. 390. It could, indeed, bring trespass after levy. *Boscher* v. *Roullier*, 4 Abb. Pr. (N. Y.) 396. But it cannot force the defendant to proceed to execution, and meanwhile it cannot safely pay the waiting bondholders without the authority of the court. The decision, though it goes beyond the authorities, is hardly against them.

EVIDENCE — WRITINGS COLLATERAL TO THE ISSUE. — The plaintiff, in a suit on an oral contract for work and materials, was allowed to put in parol evidence of the contents of a written contract between the defendant and a third party, in order to show that the work for which he sought to recover was not included in that contract. *Held*, that the evidence is not admissible. *Taft* v. *Little*, 178 N. Y. 127. See NOTES, p. 560.

FALSE PRETENSES — OBTAINING GOODS SENT BY CARRIER — VENUE. — The defendant, in Allegheny County, Pennsylvania, by false pretenses induced a firm in New York to ship goods to him. *Held*, that the Allegheny County Court has jurisdiction. *Commonwealth* v. *Schmunk*, 56 Atl. Rep. 1088 (Pa.).

It is universally held that the offense of obtaining goods by false pretenses is committed where the goods are obtained, without regard to where the pretenses were made. *State* v. *House*, 55 Ia. 466. As under most shipping contracts the carrier is properly held to be the agent of the vendee, the courts generally reach the conclusion that goods consigned to the vendee are "obtained" by him when they are delivered to the common carrier. *Norris* v. *State*, 25 Oh. St. 217; *cf. Wilcox Silver Plate Co.* v. *Green*, 72 N. Y. 17. If, however, the contract, fairly interpreted, shows that the carrier is to be treated as the agent of the vendor, it might well be held that the goods are obtained only when actually received by the vendee. No facts to justify this interpretation appear in the principal case, and it would therefore seem that the former rule should have been applied. The decision is the more remarkable from the fact that in an earlier case in Pennsylvania a lower court had adopted the opposite rule. *Commonwealth* v. *Goldstein*, 3 Pa. Co. Ct. Rep. 121.

FEDERAL COURTS — JURISDICTION — ENJOINING PROCEEDINGS IN STATE COURTS. The insured had instituted proceedings in the state courts on policies issued by several insurance companies. Some of the causes had been removed to the federal courts on the ground of diversity of citizenship, but the rest could not be removed on account of the insufficiency of the amount in controversy. The insurers were liable

pro rata if at all, and the same defense had been interposed to all the actions. *Held*, that the prosecution of the suits in the state courts may be enjoined by a federal court of equity, pending a settlement by it of the questions common to all the suits. *Rochester, etc., Ins. Co.* v. *Schmidt*, 126 Fed. Rep. 998 (Circ. Ct., Dist. of S. C.).

Proceedings in the equity side of a federal court to try a question common to several suits at law in the same court, are regarded as ancillary to the proceedings at law, and this fact of itself is sufficient to confer jurisdiction. *Freeman* v. *Howe*, 24 How. (U. S.) 450, 460. It seems, however, an unwarranted extension of this rule which enables a federal court to join in the proceeding parties to suits in the state courts. This being true, there is difficulty in justifying the injunction against further proceedings in the state courts. Although this prerogative is denied to federal courts, except as incidental to bankruptcy jurisdiction, by U. S. Comp. St. 1901, p. 581, it is held that U. S. Comp. St. 1901, p. 580, empowers a federal court which has assumed jurisdiction, to enjoin subsequent proceedings in the state courts, when this is necessary to protect its own jurisdiction. *Fisk* v. *Union Pacific Ry. Co.*, 10 Blatchf. (U. S.) 518. The principal case does not fall within this exception, and the considerations of economy and convenience which would naturally dispose the court to grant the relief can hardly justify a direct violation of the statute first cited. One other decision, however, has reached the same result. *Virginia, etc., Co.* v. *Home Insurance Co.*, 113 Fed. Rep. 1.

Federal Courts — Removal of Causes — Subsequent Jurisdiction of State Court. — An action brought in a state court was removed by the defendant into the federal court, where the plaintiff secured a dismissal without prejudice. Subsequently the plaintiff brought a similar action on the same facts in the same state court. *Held*, that the court has jurisdiction. *De Witt* v. *Chesapeake, etc., Ry. Co.*, 79 S. W. Rep. 275 (Ky.).

When a case has been properly removed from a state to a federal court, the jurisdiction of the former over the action is at an end. *Kern* v. *Huidekoper*, 103 U. S. 485. Whether the state court may later entertain a similar action on the same facts if the first has been withdrawn without any decision on the merits, appears not to be settled. It has been held in Kentucky that it may do so. *Adams Express Co.* v. *Schofield*, 64 S. W. Rep. 903. The authority of this decision however was later weakened by Kentucky *dicta* which took the opposite view. See *Chesapeake, etc., Ry. Co* v. *Riddle's Adm'x*, 72 S. W. Rep. 22 (Ky.). There are several cases in apparent accord with these *dicta* and opposed to the present decision. *Baltimore, etc., R. R. Co.* v. *Fulton*, 59 Oh. St. 575. The view of the principal case is believed to be the better. The general rule is that whenever an action is dismissed without a determination of its merits, matters stand as they did before action brought. See *Loeb* v. *Willis*, 100 N. Y. 231. No good reason appears why a different rule should apply to cases which have been removed to a federal court and there dismissed.

Husband and Wife — Action against Wife's Relatives for Enticing Her Away. — A brother and brother-in-law gave their married sister advice in consequence of which she left her husband. *Held*, that they are liable to the husband in damages unless their advice was asked by the wife and was given in good faith. *Smith* v. *Kaye and Robinson*, 48 Sol. Jour. 271 (Eng., Leicester Assizes).

It was early established that a man could have an action against any one who enticed away his wife. *Winsmore* v. *Greenback*, Willes 577. In the United States some cases still hold that any one giving unsought advice in consequence of which the wife leaves her husband is liable. *Modissett* v. *McPike*, 74 Mo. 636. The great weight of authority, however, is that parents and near relatives are protected in advising a wife if they do so in good faith for her good. *Glass* v. *Bennett*, 89 Tenn. 478. This exception is based on the natural affection and duty between members of a family which require them to have thought for each other's welfare as well after as before marriage. In England the subject seems now to have come up for the first time, and in the absence of precedent for this protection of relatives, the inferior court which decided the case not unnaturally followed the strict principle of the early law.

Infants — Avoidance of Contracts — Restoring Status Quo. — In a suit by a minor to recover the premiums paid on a life insurance contract which he had repudiated, the defendant contended that the expense to which it had been put in maintaining the policy should be deducted from the premiums. *Held*, that the plaintiff can recover the entire amount of the premiums. *Simpson* v. *Prudential Insurance Co. of America*, 68 N. E. Rep. 673 (Mass.).

As the contract of insurance was not for a necessary, the plaintiff could avoid it on the ground of infancy. There is, however, a conflict as to the rights of the parties in

case of such rescission. It is generally held that after the infant disaffirms the contract the adult may recover the consideration, if it is in the infant's possession; but if not, he is without remedy. *Shirk* v. *Shultz*, 113 Ind. 571. Some states require compensation for deterioration of the consideration, or payment of its value, as a condition to rescission. *Heath* v. *Stevens*, 48 N. H. 251. The Massachusetts court has previously held that if a contract is of such a nature as to be clearly beneficial to the infant, and is fully executed, the infant, if he rescind, must put the adult in *statu quo*. *Breed* v. *Judd*, 1 Gray (Mass.) 455. There seems, however, to have been no decision that the adult should be made whole when, as in the principal case, the contract was not plainly beneficial to the infant.

INJUNCTIONS — PREVENTION OF CRIMINAL PROSECUTION. — The county attorney threatened to prosecute the plaintiff's salesmen for selling alcohol to druggists to be used as a drug. The plaintiff sought to enjoin him on the ground that such sales were not in violation of the statute. *Held*, that equity is without jurisdiction. *Greiner-Kelly Drug Co.* v. *Truett*, 79 S. W. Rep. 4 (Tex., Sup. Ct.). See NOTES, p. 567.

INJUNCTIONS — PROTECTION OF DE JURE PUBLIC OFFICER. — The keeper of a penitentiary sought by injunction to restrain certain commissioners and the sheriff from proceeding under a void statute to remove him and put the penitentiary in charge of the sheriff. *Held*, that equity has no jurisdiction in the case. *Corscadden* v. *Haswell*, 177 N. Y. 499.

Equity will not pass upon a disputed title to public office, but leaves the parties to law. *Tappan* v. *Gray*, 9 Paige (N. Y.) 507; *Harding* v. *Eichinger*, 57 Oh. St. 371. On this basis four judges in the principal case refused an injunction. But the three dissenting judges seem right in concluding that, as by the facts the defendants were acting without color of right, title to office was not in dispute. The question, then, is whether equity will protect an officer *de jure* from admittedly unlawful interference and dispossession. There is a twofold reason why equity should take jurisdiction: first, it serves the public by preserving the stability of public offices without attempting to control them; and second, it gives the incumbent the only adequate remedy by preventing loss of office and its emoluments, and the interruption of his work, as opposed to legal actions for reinstatement and damages after the wrong is done. *Armigo* v. *Baca*, 3 N. Mex. 294. This conclusion is supported *a fortiori* by those cases which protect *de facto* officers, pending actions at law. *Brady* v. *Sweetland*, 13 Kan. 41.

INNKEEPERS — DUTY TO GUESTS — TORT OF SERVANT. — The defendant was the proprietor of a hotel at which the plaintiff and his family were guests. The plaintiff's infant son was injured by the discharge of a revolver, fired by the defendant's servant. It did not appear whether the discharge was accidental or intentional. The plaintiff sued the defendant for breach of contract. *Held*, that the defendant is liable for breach of an implied contract to protect his guest. *Clancy* v. *Barker*, 98 N. W. Rep. 440 (Neb.).

As the act of the servant was clearly outside the scope of his duty, the master would not be liable from the point of view of the law of agency. *Morier* v. *St. Paul, etc., Ry. Co.*, 31 Minn. 351. But although no decision upon the exact point decided has been found, the result seems to be in accord with the trend of recent cases. Modern decisions tend to hold a carrier liable for all torts of its servants committed against a passenger during the carriage, on the ground that the contract imposes upon the carrier a duty of protection. *Chicago, etc., Ry. Co.* v. *Flexman*, 9 Ill. App. 250. As an innkeeper bears a somewhat similar relation toward his guests, it would seem that, by analogy, his contract imposes a like duty to protect them. He has been held liable for injuries to his guests caused by third persons, which he might have prevented. *Rommel* v. *Schambacher*, 120 Pa. St. 579. And the principal case is not without support in imposing upon him an absolute liability for injuries to guests caused by his servants. See *Overstreet* v. *Moser*, 88 Mo. App. 72.

INSANE PERSONS — AVOIDANCE OF CONTRACT — RESTORATION OF CONSIDERATION. — The plaintiff sued to set aside her conveyance on the ground of insanity. The grantee had paid a fair consideration, and had acted in ignorance of the plaintiff's incompetency. *Held*, that the grantee must be restored to his original position as a condition precedent to relief. *Coburn v. Raymond*, 57 Atl. Rep. 116 (Conn.).

It is now established in most jurisdictions that the contract of an insane person who has not been so adjudged is not void, but is at most voidable only. *Blinn* v. *Schwarz*, 177 N. Y. 252. If the contract is executory, or made with a person knowing of the incompetency, and is not for necessaries, the insane person may treat it as not binding.

Loomis v. *Spencer*, 2 Paige (N. Y.) 153. As to the rights of a lunatic who has received the benefit of a fair and completely executed contract the decisions are in conflict. A few states hold that his right to avoid such a contract is absolute. *Gibson v. Soper*, 6 Gray (Mass.) 279. But it would seem that protection to the lunatic and justice to innocent persons dealing with him would both best be accomplished by allowing an insane person to set aside such a contract either on returning the consideration or, if he has parted with it, on paying its value. It is, however, almost everywhere held, as in the principal case, that such a contract cannot be set aside unless the parties can be put in *statu quo* by returning the consideration itself. *Molton v. Camroux*, 2 Exch. Rep. 487.

INSURANCE — SUICIDE AS DEFENSE. — A fraternal insurance contract provided that the certificate should be void in case the member died in consequence of the violation or attempted violation of the laws of any state or territory. The insured having committed suicide, this action was brought to recover the amount called for by the certificate. *Held*, that suicide is not a crime under the statutes of the state of Illinois, and is, therefore, no defense to the action. *Royal Circle v. Achterrath*, 68 N. E. Rep. 492 (Ill.). See NOTES, p. 566.

MANDAMUS — PARTIES PETITIONING — SUFFICIENCY OF INTEREST. — A private citizen sought a mandamus to compel the clerk of the county court to allow him to inspect certain poll books and tally sheets for the sole purpose of gathering evidence upon which to base a criminal prosecution for fraudulently conducting an election. *Held*, that mandamus will not lie. *Payne* v. *Staunton*, 46 S. E. Rep. 927 (W. Va.).

In the case of the enforcement of a mere private right by mandamus, the relator must show some special or personal interest in the right. *People* v. *Masonic Benevolent Association*, 98 Ill. 635. And by the weight of authority mandamus will issue where the relator represents and seeks to vindicate a public right, though he have no interest greater than that common to the whole body of citizens. *State* v. *Hannibal, etc., R. R. Co.*, 86 Mo. 13. The principal case proceeds upon the ground that the public as well as the private interest must be a substantial pecuniary one. It would seem that the facts of the case satisfy either requirement. A voter's private pecuniary interest in seeing that his vote is correctly counted is apparently as great as in seeing that he is registered to vote at all; and the public pecuniary interest in honest supervision of elections seems to be as great as in having a proper return by the board of canvassers. In both of these cases mandamus lies. *Davies* v. *McKeeby*, 5 Nev. 369; *Brown* v. *Commissioners of Rush Co.*, 38 Kan. 436. But in any case, as the dissenting opinion cogently points out, the preservation of the purity of the ballot box is a matter of the greatest concern, public and private, and rises above any question of mere pecuniary interest. *State* v. *King*, 154 Ind. 621.

MASTER AND SERVANT — THE FELLOW-SERVANT DOCTRINE APPLIED TO INFANTS. — The plaintiff, a child of twelve, was injured while working in the defendant's mill, by certain machinery set in motion by another employee. The plaintiff, who was non-suited on the ground that the injury was caused by her fellow servant, appealed. *Held*, that the non-suit is erroneous. *Evans* v. *Josephine Mills*, 46 S. E. Rep. 674 (Ga.). See NOTES, p. 562.

NEW TRIAL — EXCESSIVE DAMAGES. — The plaintiff obtained a verdict for twelve thousand dollars in an action against the defendant for negligence. At that time the plaintiff had not yet recovered from the accident, and the extent of her injuries depended largely on the result of an operation which could not be determined until a few weeks after the trial. The defendant asked for a new trial on the ground of excessive damages. *Held*, that the new trial will be granted. *Searles* v. *Elizabeth, etc., Ry. Co.*, 57 Atl. Rep. 134 (N. J., Sup. Ct.).

The power of granting new trials, first exercised to prevent injustice, was originally limited by judicial discretion only. Although rules have been developed in practice which, whether embodied in statutes or not, compel the granting of new trials in certain defined cases, the original discretionary power of the courts as to all other cases has not been affected. See *Fine* v. *Rogers*, 15 Mo. 315. The present decision, in view of its peculiar facts, seems fairly to fall within the latter class. The damages given were not excessive if the plaintiff's injuries were permanent, but to conclude that they were permanent required the assumption of the failure of an operation the result of which was at the time of the trial undetermined. In granting a new trial the court could rely upon no established rule, but it thought that injustice might be done in depriving the defendant of the possible benefit which the ascertainment of the result of the operation might give him, thus resting the case upon the primary reason for granting new trials.

PLEDGES — STOCK REPLEDGED WITH STOCK OF OTHERS. — A broker purchased certain stock for X on margin; M had pledged other stock with him to secure a loan; and H had deposited still other stock with him for safe keeping. All the certificates bore assignments in blank. The broker pledged the whole amount as security for money advanced by T, who acted in good faith on the broker's apparent title. The broker became insolvent, and T sold the securities of M and X, thereby obtaining enough to repay the loan. *Held*, that H is entitled to his securities free and clear. *Tompkins* v. *Morton Trust Co.*, 91 N. Y. App. Div. 274. See NOTES, p. 565.

POST-OFFICE — "PERIODICAL PUBLICATIONS." — The Post-office appropriation bill of March, 3 1879, U. S. Comp. St., p 2646, admits, subject to certain conditions, "periodical publications" to classification as second-class matter. The "Riverside Literature Series" consisted of publications issued monthly, each number being complete in itself, and containing a single novel, story, or collection of stories. *Held*, that these publications are not periodical publications. *Houghton* v. *Payne*, U. S. Sup. Ct., April 11, 1904.

The postal department has in the past regarded all publications issued at regular intervals, which are externally similar and numbered consecutively as periodical publications within the meaning of the statute. The effect of the present decision is to require, in addition to these external facts, a continuity in subject-matter which will make each number a part of a series, not an entity in itself. The term "periodical publication" commonly conveys this idea of continuity. Taking the two words separately, however, the pamphlets in question were "publications" and were also "periodical." The expression seems, indeed, entirely susceptible of either interpretation. In view of this ambiguity, there is considerable weight in the argument of the minority in the principal case that the postal department should be forced to continue its previous practice. *Cf. United States* v. *Finnell*, 185 U. S. 236, 244.

SURETYSHIP — SUBROGATION IN FAVOR OF SURETY INCURRING OBLIGATION WITHOUT REQUEST OF DEBTOR. — An agent gave a bond with sureties to his principal. Without the knowledge of the agent or his sureties, the plaintiff bound himself to pay to the principal any sums due from the agent to the principal which the agent and his sureties should fail to pay, and was, as a consequence, forced to make good a subsequent default. *Held*, that the plaintiff is not subrogated to the principal's rights against the sureties. *Crane* v. *Noel*, 78 S. W. Rep 826 (Mo., Ct. App.).

A stranger who pays a debt without being asked by the debtor, or required to pay in order to protect his own interests, is not subrogated to the creditor's rights against the debtor. *Aetna Ins. Co.* v. *Middleport*, 124 U. S. 534. While conceding the practical injustice of its decision, the court in the principal case regarded the plaintiff as a volunteer, since he was not bound to become a surety, and considered itself bound by the above-stated rule. Since the taking of sureties without the concurrence of the debtor is a usage sanctioned by the business world, it seems unjust to regard such sureties as intermeddlers; and allowing them the right of subrogation does not prejudice the debtor. These considerations led the court to decide in favor of the surety in the only other case found in which the question raised in the principal case was discussed. *Matthews* v. *Aikin*, 1 N. Y. 595.

TAXATION — EXEMPTIONS — FRANCHISE AND PROPERTY TAXES. — In a suit by the collector of taxes for the recovery of a license tax upon the defendant bank's business, the bank set up in defense the following provision of its charter: "the capital of the bank shall be exempt from any tax." *Held*, that this provision exempts the bank from a license tax. Brewer, Fuller, and Harlan, JJ., dissent. *Citizens' Bank of Louisiana* v. *Parker*, 24 Sup. Ct. Rep. 181.

There is a well-recognized distinction between a franchise tax and a property tax, and exemption from one does not necessarily include exemption from the other. *Bank of Commerce* v. *Tennessee*, 161 U. S. 134. This is based on the doctrine that exemption from taxation shall be construed strictly. *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 662. In the principal case, however, the charter was issued in 1833, and the contract which the Supreme Court is now called upon to interpret was made at that time. The exemption intended therefore is to be determined by the meaning of the words at that time, and any ambiguity is to be settled by the circumstances under which the parties then acted. In Louisiana in 1833 the distinction between franchise and property taxes was not understood, and exemption "from any tax" probably included exemption from both. See *City of New Orleans* v. *Southern Bank*, 11 La. Ann. 41. From the conditions surrounding the chartering of this bank, also, it is evident that such was the intention of the parties. See *New Orleans* v. *Citizens' Bank*, 167 U. S. 371.

TAXATION — PROPERTY WITHIN THE JURISDICTION — VALUING PROPERTY OF INTER-STATE EXPRESS COMPANY. — Indiana valued the property of the American Express Company as a unit, and assessed a proportion of that value equal to the proportion of mileage in Indiana. $17,000,000 of such total value resulted from bonds and real estate held outside of Indiana claimed to be not used in the business. The company sought to enjoin the certification of the assessment. *Held*, that the injunction will issue. Fuller, C. J., and Brewer and Day, JJ., dissented. *Fargo* v. *Hart*, 24 Sup. Ct. Rep. 498.

It is settled that property used in an established business derives an additional taxable value from its connection with the remaining business equipment. The majority considered the $17,000,000 in question too remotely connected with the company's business in Indiana to have any direct relation to the value of its property there used. The state claimed that this fund was really used to assure the company's credit. Just what property is used in a given business is essentially a question of fact. The different parts of a railroad are plainly united in use. *Pittsburg, etc., Ry.* v. *Backus*, 154 U. S. 421. The teams of an express company are less closely related to each other, and although they have been held united, the strong dissent indicated that the limit was about reached. *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194. The connection of the business equipment with the property in question here is much more remote, since such property has practically no effect in increasing or facilitating the business done. An assessment increased by it is therefore based on property outside the state and is not permissible. See *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185, 221.

TRUSTS — FOREIGN INVESTMENTS BY TRUSTEE. — The sole objection to a trustee's investment of a small part of the trust funds in real estate was that the property was in a foreign jurisdiction. The trustee acted "in good faith and with sound discretion." *Held*, that the objection is not valid. *Thayer* v. *Dewey*, 69 N. E. Rep. 1074 (Mass.).

This decision is expressly contrary to the prevailing view that to invest in fixed property in a foreign jurisdiction is improper, unless authorized by the creator of the trust or required by special circumstances, such as the protection of other interests of the trust. *Ormiston* v. *Olcott*, 84 N. Y. 339. But in most jurisdictions the field for investments by trustees has always been more arbitrarily limited than in Massachusetts. By the orthodox rule it was confined to public securities and first mortgages on land. *King* v. *Talbot*, 40 N. Y. 76. On the other hand Massachusetts has never recognized such limitations. For example, it early allowed investments in corporate stock if they satisfied the fundamental requirement that they be made in good faith and with the sound discretion of diligent business men seeking permanent investments. *Harvard College* v. *Amory*, 9 Pick. (Mass.) 446. The principal case is a striking application of the Massachusetts policy of refusing to limit arbitrarily this simple requisite.

UNFAIR COMPETITION — MEANS UNLAWFUL AS TO THIRD PARTIES — COERCION BY FINES. — By the by-laws of a granite manufacturers' association, any member who dealt with dealers in granite in a certain town who were non-members of the association, was liable to a fine. Fines were imposed upon several members, and as a result the business of the plaintiff, a non-member, was ruined. *Held*, in an action against the members, that the plaintiff can recover. *Martell* v. *White*, 69 N. E. Rep. 1085 (Mass.). See NOTES, p. 558.

VENDOR AND PURCHASER — VENDOR'S DUTY TO ACCOUNT FOR RENT — APPLICATION OF PAYMENTS. — A vendor of land in the possession of a tenant elected to receive interest from the vendee after the latter's failure to complete the purchase at the appointed time. In a suit for specific performance he claimed the right to appropriate to arrears of rent, due before the date for completion of the bargain, rent paid him by the tenant after that time. *Held*, that the vendor must hold the rents for and on account of the vendee. *Plews* v. *Samuel*, [1904] 1 Ch. 464.

Although a contract for the sale of land creates a relation in a broad sense fiduciary and closely analogous to that of mortgage, yet in some respects the situation is different from the mortgage relation. On default of the vendee at the time for completion of the bargain, the vendor, unlike a mortgagee, has an option to retain the rents and profits or to receive interest on the purchase money. See *Barsht* v. *Tagg*, [1900] 1 Ch. 231. But if, as in the principal case, he chooses the latter, he must account for the rents and profits received, and furthermore is liable for the profits which with due diligence he might have produced. *Phillips* v. *Silvester*, L. R. 8 Ch. 173. In requiring that the vendor shall consider the rent received as current rent, not as arrears, the principal case simply recognizes in a new way this fiduciary position of the vendor, and applies the regular rule of trusts, that when a fiduciary has a choice of conduct his

personal interest may not compete with his duty to his beneficiary. *Cf. Fulton* v. *Whitney*, 66 N. Y. 548.

WILLS — ALTERNATIVE DEVISE TO WIFE OF WITNESS — EFFECT. — Section 15 of the Wills Act provided that a devise to the wife of an attesting witness should, "so far only as concerns such wife, be utterly null and void." The testator devised his property to his wife for life, remainder to his daughter or her children. The daughter, whose husband attested the will, survived the wife and had children. *Held*, that there is an intestacy of the remainder. *Aplin* v. *Stone*, [1904] 1 Ch. 543.

The court, by analogy to the method of applying the rule against perpetuities, first construed the will apart from Section 15 of the Act. This construction gave an absolute estate to the daughter. Then, applying that section, this estate is pronounced void, with a resultant intestacy. See *In re Townsend's Estate*, 34 Ch. D. 357. But in another case whose facts seem indistinguishable from those of the principal case, it was held that the alternative gift vested, treating the clause containing the void devise as if blotted out of the will. *In re Clark*, 31 Ch. D. 72. It is submitted that the latter result not only has the merit of preventing an entire failure of the testator's wishes, but is supportable on principle. It is settled that a devise to a class of which the attesting witness is a member is construed to be to the members of the class capable of taking; and upon the same principle, the gift in the present case might fairly be construed as to the daughter, if capable of taking, otherwise to her children. *Cf. Fell* v. *Biddolph*, L. R. 10 C. P. 701.

WILLS — CONSTRUCTION — CY-PRES DOCTRINE. — A testator devised real estate to his children, and in case they should leave issue, the share of each child to his or her children for life, share and share alike, so to be continued in a descending line *per stirpes* from issue to issue for life, the children of the parent dying taking the parent's share equally between them in all cases of decease. There was no devise over. *Held*, that the *cy-pres* doctrine is inapplicable, and that the estates will not be construed as an estate tail. *In re Richardson*, [1904] 1 Ch. 332.

Estates were limited in a will to W. for life, remainder to his sons born during the testator's lifetime successively for life, remainder after the decease of each such son to his sons successively in tail male, remainder to W.'s sons born after the testator's death successively in tail male, remainder to W.'s daughters successively, remainder after the death of each daughter to her sons successively in tail male, remainder to testator's daughter E. for life, remainder to her sons successively in tail male, remainder to her daughters successively, etc. *Held*, that the *cy-pres* doctrine is not applicable, and that the estates limited will not be construed either an estate tail or an estate tail male in W. *In re Rising*, [1904] 1 Ch. 533. See NOTES, p. 559.

WITNESSES — PRIVILEGED COMMUNICATION BETWEEN PHYSICIAN AND PATIENT. *Held*, that a physician who treats a person against his will cannot give in evidence information concerning such person obtained in the course of the treatment. *Meyer* v. *Knights of Pythias*, 178 N. Y. 63.

In most states a physician is forbidden by statute to disclose in testimony, upon objection by the patient or his representatives, information regarding the patient, gained while acting in his professional capacity. Although in some jurisdictions only confidential communications seem to be protected, generally, when once the relation of physician and patient exists, any information, acquired either from statements of the patient or from examination and observation, is privileged. *Prader* v. *National, etc., Ass'n*, 95 Ia. 149; *cf. Scripps* v. *Foster*, 41 Mich. 742. If a person voluntarily submits to a mere examination by a physician employed by an opponent, he does not thereby become a patient within the meaning of the statutes. *People* v. *Kemmler*, 119 N. Y. 580. But if such physician, after the examination, prescribes for the person, the relation is at once established. *Freel v. Market St. Ry. Co.*, 97 Cal. 40. Since the statutes governing the question were passed for the benefit of the patient, the present decision seems sound in holding that the fact of treatment, rather than consent, is decisive in establishing such relation. Otherwise, the object of the statute would be defeated by compelling a patient thus to furnish evidence against himself.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

DANIEL ON NEGOTIABLE INSTRUMENTS: FIFTH EDITION. — With considerable vigor and some severity the Hon. John W. Daniel answers the criticism of the last edition of his work on Negotiable Instruments which appeared in Volume 16, page 605 of this REVIEW. The greater part of the learned author's letter which was published in 58 Central Law Journal 69, is devoted to an argument in further support of his dissent from "the cases which decide that the drawee paying a forged draft cannot recover back the amount from the party to whom he paid it, whether such party received it before or after acceptance." In his book, § 1361, Mr. Daniel based his dissent on two grounds, first, that if the holder indorses the draft he "warrants its genuineness," and second, that if he does not indorse it, yet "his very assertion of ownership is a warranty of genuineness in itself." We endeavored in our review to show that the cases cited in support of the first ground do not sustain the author, and that the cases cited in support of the second ground were not in point, being cases of a sale of the instrument or a transfer of it in payment of a debt of the transferrer. We think that our conclusion has not been overcome by the author in the argument in his letter, which, in so far as it gives new reasons for his view, seems to be based on the theory that the drawee should recover because the payment was made under a mistake of fact, and also for the further reason that the consideration has failed. The claim that the holder should be "liable on the ground of failure of consideration when he gets thereby the money of payment for it," and the reference to *Aldrich* v. *Jackson*, 5 R. I. 218, only emphasize the learned author's unwillingness to distinguish the case under discussion from such wholly different cases as a sale of a forged instrument, or a payment of an instrument to which the holder has no title, because of the forgery of an indorsement of the real owner.

It is not necessary that the holder of a draft should give a consideration to the drawee, nor does it matter whether the drawee receives or expects to receive a consideration from the drawer. The payee or other holder of a bill and the drawee are remote parties. The learned author himself furnishes us authority on this point. DANIEL, NEGOT. INSTR., 5th ed., § 174 a, and n. 50.[1]

Much more may be said for the theory that the drawee should recover because the payment was made under a mistake of fact than for any other of the reasons assigned by the learned author in his book or in his letter. We believe, however, that the argument for recovery in quasi contract has been so fully met by Professor Ames in his article on "The Doctrine of Price *v.* Neal" in 4 HARV. L. REV. 297, that it would not be profitable for us to give time and space to it here. See also the article by Professor Ames on "Forged Transfers of Stock" in the present number.

As to the claim that a holder who presents for payment an instrument to which the signature of the drawer has been forged, warrants the genuineness of the instrument if he indorses it, we submit that this is not true either as a matter of intention or of law. "Every man in presenting a draft for payment says in substance either expressly or by implication, 'Here is the draft of

[1] In examining the cases cited in this note we discovered a mistake in arrangement. In § 174, n. 8, of the third edition, the author states the case of Hoffman & Co. *v.* Bank of Milwaukee, 12 Wall. 181. In the fourth edition and in the last edition several other cases are interpolated between the citation and the statement of this case, so that the statement now seems to have reference to the case of Arpin *v.* Owens, 140 Mass. 144. See fourth ed., § 174 a, n. 6, fifth ed., § 174 a, n. 50.

A. B. that I wish you to pay.' Such a statement in the ordinary course of business, would not be understood as a warrantee of the genuineness of the draft. . . . The holder has not the means of knowing whether the draft is genuine, and looks to the drawee for confirmation on this point, and his statement that he has such a draft can only mean that he has a draft signed with such a name."[1] In the analogous case of *Leather* v. *Simpson*, L. R. 11 Eq. 398, a bill was sent by a bank to the drawee for acceptance with a memorandum attached which stated that the bank held a bill of lading for cotton. The drawee accepted the bill, and afterwards paid it and received the bill of lading which proved to be forgery. In an action to recover back the money plaintiff claimed that the memorandum attached to the bill was a representation that the bank was the holder of a genuine bill of lading. But the court regarded the memorandum as having only the effect of saying "we have a bill of lading," and that the fair meaning of this may possibly be "we have a document which on the face of it is a bill of lading." Nothing had occurred to excite their suspicions. They believed it to be a bill of lading, and they therefore so called it. But this did not amount to a representation that it was a genuine bill of lading.[2]

But what is the meaning of the writing by the holder of his name on the back of a bill which he presents to the drawee for payment? If a bill is payable to the order of A, or to A or order, A is entitled to sue on it without indorsing it.[3] In Comberbach, 401, Lord Holt said, "Where a bill of exchange is payable to a man's order, that is to himself if he makes no order." In *Smith* v. *M'Clure*, 5 East 476, Lord Ellenborough said that "a bill payable to a man's own order was payable to himself if he did not order it to be paid to any other." In *Sherman* v. *Goble*, 4 Conn. 246, it was held that the legal construction of a note to the order of plaintiff is that it is payable to himself. So the declaration need not allege that he ordered it paid to himself.

In like manner the payee or other holder of an instrument should be entitled to payment without indorsing it. There are few authorities on this point. In *Osborn* v. *Gheen*, 5 Mackey 189, it was held that the payee of a check was not under obligation to indorse it in blank as a voucher for payment when he receives payment thereon. In 26 Albany L. J. 61, is a statement of a case decided by the Common Pleas Court at Cleveland, Ohio, in which it was held that when the payee of the check had indorsed it in blank and delivered it to the holder the drawee bank could not require the holder to indorse the check as a condition to payment. In *Rowley* v. *Nat'l Bk. of Deposit*, 63 Hun 550, a check drawn to order of a payee was deposited by him in a bank, which presented it to the drawee bank for payment, and payment being refused, the drawer sued the drawee bank. The complaint did not state that the payee had indorsed the check, and this was held a fatal defect. This was right because the complaint showed no title in the bank in which the check was deposited, and which presented it for payment. But in the later case of *Eichner* v. *Bowery Bank*, 24 N. Y. App. Div. 63, a complaint was held insufficient when the payee himself presented the check, but no averment was made that it was indorsed by the payee. The court rested its judgment solely on the case of *Rowley* v. *Nat'l Bank of Deposit*, which is clearly distinguishable. But whether *Eichner* v. *Bowery Bank*, was correctly decided or not, it affords no authority for the right of a drawee to require an indorsement by the holder of a bill or check for any other purpose than as a receipt of payment.

Whether upon payment of a bill or note the drawee or maker can insist upon a receipt is a question which engaged the attention of early writers on negoti-

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[1] Bernheimer *v.* Marshall & Co., 2 Minn. 78, 84.

[2] See also Goetz *v.* Bank of Kansas City, 119 U. S. 551; First Nat'l Bank *v.* Burkham, 32 Mich. 328; and the analogous case of Sheffield Corporation *v.* Barclay, [1903] 2 K. B. 580.

[3] Frederick *v.* Cotton, 2 Show. 8; —— *v.* Ormston, 10 Mod. 286; Smith *v.* M'Clure, 5 East 476; Myers *v.* Wilkins, 6 U. C. Q. B. 421; Sherman *v.* Goble, 4 Conn. 246; Durgin *v.* Bartol, 64 Me. 473; Huling *v.* Hugg, 1 W. & S. 418.

able instruments. While expressing doubt upon this point, the writers all state that it is usual to give a receipt on the back of the bill. This custom runs far back. We find a passage in MARIUS (2d ed. 1654) 68, which is too long to quote, to the effect that when the holder sent a bill indorsed in blank to an agent to collect, the agent would either write an assignment to himself over the blank signature and then write a receipt for the money over his own signature, or write a receipt over the blank signature of the holder. If the agent sent his man to collect the bill the man might either deliver up the bill without any writing, or might fill up the empty place with an assignment payable to his master, and then receipt underneath for the money received for his master's use, "governing himself therein according as the party that shall pay the bill of exchange shall direct, for either way is good and warrantable, according to the custom of merchants used in England."[1] Marius also says (p. 11) that it is usual on writing the name on the back of the bill to leave some space above the name to make a receipt for the money. In an anonymous pamphlet published in 1769 entitled "Obscurities and Defects of the Mercantile Law Considered in an Essay on Bills of Exchange," various forms of bills are given. With the first of these forms there is also a form of special indorsement by the payee which is followed by a form of receipt of payment signed by the indorsee (pp. 9, 10). On page 57 the author of the pamphlet says, "When a bill of exchange is paid by the acceptor, the *pro tempore* holder gives a full discharge on the back of the bill (as may be seen in the first copy) which ends the whole transaction." In Chitty on Bills (1st ed. 1799) 157, it is said that it is doubtful whether a person paying can insist on a receipt being given, "but it is usual to give a receipt on the back of the bill." Maxwell says, "The receipt of a bill or note need not, like other receipts, be stamped, it is usually given on the back of the bill." Maxwell's Pocket Dictionary of the Law of Bills of Exchange (Amer. ed. 1808) 171. In Rolle's Pocket Companion to the Law of Bills of Exchange published in 1815, the author says on page 76, "In all cases on payment of a bill or note, a receipt should be written on the back of it, and this receipt should state by whom the payment has been made." That the custom was the same in Scotland appears from Glen on Bills of Exchange 163, 164; Muir on Bills of Exchange 39. Swift says, in his Treatise on Bills of Exchange and Promissory Notes (1810) 323, that "when a party pays a bill he is entitled to a receipt, and the usual practice is to give a receipt on the back of the bill." In Story on Promissory Notes, the first edition of which was published in 1845, the author says (§ 452), "In cases of Bills of Exchange it is usual to give a receipt upon the back of the bill." Whether this was still the custom in this country at that time, or whether Story simply took the statement from Chitty, whom he cites as authority, we have no means of knowing. Edwards on Bills and Notes (1st ed. 1857) 577, also states that it is usual to give a receipt on the back of bills. That it was usual to write a receipt on the back of a bill of exchange is also shown by the cases which discuss the effect of the receipt as evidence to show by which party the bill was paid.[2] The English Stamp Acts bear witness to the same custom. While they impose a stamp duty upon receipts, they exempt "receipts written upon a bill of exchange or promissory note duly stamped."[3]

Upon all this evidence is it not reasonable to conclude that the practice of indorsing the name of the holder upon a bill or note when presenting it for payment to the drawee or maker, is founded upon the custom of receipting payment on the back of the instrument, and that such indorsements to-day are only receipts with the receipt form dropped off?

In Grant on Banking (5th ed.) 23, the author says, "A payee, however, writing his name on the back of a cheque as an acknowledgment of payment is

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[1] See also Hayes's Negociator's Magazine (3d ed. 1530) 64, 65, to the same effect.

[2] Scholey *v.* Walsby, Peake 24; Pfiel *v.* Vanbatenberg, 2 Campb. 439; Graves *v.* Key, 3 B. & Ad. 313; Egg *v.* Barnett, 3 Esp. 196.

[3] 33 & 34 Vict. c. 97; Schedule Receipt (9); 54 & 55 Vict. c. 39, 1st Schedule Receipt (8); 23 Geo. 3, c. 49, § IV.

not such an indorsement as subjects him to any liability." In *Keene v. Beard*, 8 C. B. N. S. 372, 382, Byles, J., said: "It is true a man's name may and very often is written on the back of a cheque or bill without any idea of rendering himself liable as an indorser. Indeed, one of the best receipts is the placing on the back of the instrument the name of the person who has received payment of it. Such an entry of the name on the instrument is not an indorsement. So a man frequently puts his name on the back of a bank note. In all these cases the act of writing may or may not be an indorsement, according to circumstances." The courts of Massachusetts and Maine have spoken in substantially the same manner, and have treated an indorsement by the holder upon receiving payment from the drawee as a mere receipt or voucher.[1] The learned author, in his letter, says that the holder in such case has given "a false and ineffective security voucher or receipt as against the party whose name is forged instead of a real one." But it is a receipt or voucher for money paid, and if it was intended by the signer for that purpose only, it can have no other effect as to him, whether, by reason of such payment, the drawer is liable to the drawee or not. The receipt proves payment by the drawee just as much as in the case of a genuine drawing. The trouble is not that the indorsement by the holder does not operate to prove payment by the drawee, but that the proof can do the drawee no good as against a drawer whose signature was forged.

So much for the legal effect of the so called indorsement. But if there be no indorsement, it is said by the learned author that "his (the holder's) very assertion of ownership is a warranty of genuineness in itself." But why? The holder does own the paper he presents. The title is in him although the paper may be worthless. The proposition above quoted belongs in a different place. It pertains to the cases in which the holder sells an instrument to which he has no title because the indorsement of the payee or some other owner has been forged. Here it may well be said that the holder's sale of the instrument is an assertion that he is the owner, which involves a warranty that all previous indorsements necessary to give him a good title are genuine. Such a case is that of *Minneapolis National Bank* v. *Holyoke National Bank*, 182 Mass. 130, which Mr. Daniel in his letter claims supports his theory "by a different process of words." When an indorsement is forged, the maker of a note or acceptor of a bill is still liable to the true owner, and upon payment to the true owner he should be subrogated to the latter's right of action against the holder for the amount received by the use of the true owner's note or bill. It is true the courts permit a recovery directly from the holder, but this is one of those equitable cross cuts, by means of which courts of law often seek to do speedy justice.[2]

The rule of *Price* v. *Neal*, adopted by the Courts of England and the United States, enacted by the Codes of Germany, France, Italy, Switzerland, Hungary, Russia, and Belgium, and approved by such judges as Mansfield, Story, and Cooley, surely cannot be said to be a mere arbitrary rule of convenience, unsupported by ethical considerations. Must we not rather say with Professor Ames that this widely recognized rule is founded on "that far-reaching principle of natural justice, that as between two persons having equal equities, one of whom must suffer, the legal title shall prevail"?[3] As the Supreme Court of Maine said in *Neal* v. *Coburn*, 92 Me. 139, 149, "Lord Mansfield compared the equities."[4] The opposition of some text writers to the rule seems to us to arise from the fact that many courts seized hold of one of the lesser reasons given by Lord Mansfield for his judgment in *Price* v. *Neal*, and from it worked out a

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[1] Dedham Nat. Bank *v.* Everett Nat. Bank, 177 Mass. 392; Minneapolis Nat. Bank *v.* Holyoke Nat. Bank, 182 Mass. 130; Neal *v.* Coburn, 92 Me. 139.

[2] See 4 HARV. L. REV. 307. See also the article on "Forged Transfers of Stock," *supra*.

[3] 4 HARV. L. REV. 299.

[4] See also the remarks of Cooley, J., in First Nat'l Bank *v.* Burkham, 32 Mich. 328, 331, and of Malins, V. C., in Leather *v.* Simpson, L. R. 11 Eq. 398, 407.

theory of estoppel against the drawee to dispute the signature of the drawer. Hence the failure of the courts of this country to apply the principle of *Price* v. *Neal* to a genuine draft which had been altered after the drawing and before the acceptance or payment. On the Continent of Europe such cases are treated as within the same rule as cases of forgery of the drawer's signature. When courts base their judgment upon estoppel, it is not surprising to find text writers drawing the conclusion, that no holder should be allowed to retain the money paid by the drawee, unless the bill had been accepted before the holder bought it.

The learned author is particularly severe in his strictures upon our suggestion that in § 726 the author gave a wrong reason for the judgment in *Carruthers* v. *West*. We must leave it to the reader to judge whether the paragraph referring to this case, taken as a whole, does not convey the impression, that the author regarded the case as holding, that notice of an agreement not to negotiate an accommodation bill after maturity was necessary in order to affect the purchaser after maturity with this equity of the accommodating party. The Court giving no reason for its judgment, we suggested that the reason was to be found in the remarks of Wightman, J., during the argument. The author answers that the argument of one of the counsel may afford the reason. We submit, that it is not usual to find reasons for a judgment in the argument of counsel, when an adequate reason is to be found in the remarks of one of the court, even though they are made only during the argument. We are not alone in our view. Chalmers refers to the remarks of Wightman, J., for the *ratio decidendi* of the case. Chalmers, Bills of Exchange, 5th ed., 117, n. 8.

The learned author says in his letter that to point out in the text the changes made by the Negotiable Instruments Law and to cite the cases "would have equalled a new book." As less than thirty-five cases had been decided up to the date of the preface of the new edition, this statement seems somewhat exaggerated. See 2 Mich. L. Rev. 284, for a collection of all cases down to January, 1904.

Typographical and Structural Errors. Under this heading the learned author collects some specific instances of carelessness pointed out by us, and speaks of them as constituting the "full hive of the insectile swarm let loose by the critic." In another part of his letter, however, the author complains in regard to the charge of unsatisfactory treatment of the subject of fictitious payee, that "specifications are few." Behold the dilemma prepared for the Critic! He must omit specifications, or giving them, be accused of insectile criticism.

But the errors mentioned were only a part of those encountered, and this was expressly stated. The learned author charges us with inconsistency in stating in one place, that we had made a careful examination of his work for the purpose of the review, and in another place, that the errors we found in this edition came to our notice, either when we opened the volumes at random, or when we examined them to find the author's views on some controverted point. The apparent inconsistency is easily explained. The errors referred to in the later statement, as was apparent from the context, were such as the author styles typographical and structural. In our first examination, which included most of the text and many of the notes, we did not pay particular attention to such errors, and it did not occur to us to make memoranda of them. Later, when we read and examined text and notes and cases cited on some controverted points, such errors became more troublesome, and we began to keep a record of them. Afterwards we opened the volumes at random in a number of places, and examined more of the notes and citations for the purpose of ascertaining whether the sort of errors we had discovered were of common occurrence. During all of these examinations, and also at other times since our review was published, we found so many defects that it seems to us reasonable to infer that the same faults characterize the book generally. The learned author asserts that he does not believe there is a larger percentage of mistakes in his work than in other books on the subject.

It is impossible to give the time to make a detailed examination of the whole of the two volumes, but since we have read the learned author's letter, we

have, by way of experiment, examined the new notes of the first chapter, which consists of thirty-six pages. We find sixty-four new cases cited, or seventy-seven cases if we count repetitions of the same case as new citations. Of these cases five are not mentioned in the Table of Cases, so that they are buried in the book without any means of finding them, if a lawyer having come upon them in some other way wishes to know what has been said of them by Mr. Daniel.[1] Seven new cases which are mentioned in the Table of Cases are not credited to one of the sections in which they are cited.[2] Six mistakes are made in crediting cases to sections in which they are not to be found.[3] In three cases the citations are incorrect as to one of the reports given.[4] The citation of one case is correct as to the report but wrong as to the page.[5] Still another error is to be found in § 24, n. 4, where a quotation from the opinion in Guinan's Appeal, 70 Conn. 347, is ascribed to Baldwin, J., instead of to Andrews, C. J., who delivered the only opinion in the case. It thus appears that in the making of seventy-seven new citations, including repetitions, there occur twenty-three omissions or errors, or over twenty-nine per cent; for each failure to mention in the Table of Cases a case cited in a note, and each failure to credit to the section where it is cited a case mentioned in the Table of Cases is an omission, and each reference in the Table of Cases to a section in which the case is not to be found is an error; so also is a reference to a wrong report or to a wrong page. We submit that this is a larger proportion of omissions and errors than is either usual or reasonable.

While not to be counted as errors occurring in the first chapter, it is not improper to say that, in the course of our examination of new cases cited in the first chapter, we found that some of the new cases are mentioned in the Table of Cases as being in sections in subsequent parts of the book where they do not appear.[6]

There are also many mistakes and omissions in respect to old cases cited in the first chapter. The percentage is not so large as in respect to the new cases. Yet, as it amounts to twenty per cent, it seems to us larger than is reasonable. Whether these mistakes occurred in former editions, we have not had time to discover. If so, they should have been corrected in the new edition. There are three hundred and fifty-one citations of old cases, including repetitions. Four of these cases are not mentioned in the Table of Cases.[7] There are thirty-four failures to credit old cases mentioned in the Table of Cases to one or more of the sections in which they are cited.[8] The Table of Cases

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[1] These cases with the sections in which they are cited are: New Orleans *v.* Benjamin, § 10 a, n. 44; Milholland *v.* Whalen, § 24 a, n. 21 & 22; Polley *v.* Hicks, § 24 a, n. 17; Yancy *v.* Field, § 24, n. 6, § 25, n. 33; Board of Missions *v.* Mechanics Sav. Bk., § 24, n. 5.

[2] Brown *v.* First National Bank, § 1, n. 2; Provident Trust Co. *v.* Mercer Co., § 1 a, n. 3; Erickson *v.* Inman, § 18, n. 74; Guinan's Appeal, § 24 a, n. 17; Sayre *v.* Weil, § 24 a, n. 20; McMahon *v.* Sav. Bk., § 24 b, n. 28; Meldrum *v.* Henderson, § 20, n. 81.

[3] Sayre *v.* Weil, § 24; McMahon *v.* Newton Sav. Bank, § 24; Smith *v.* Smith, § 24 b; Provident Trust Co. *v.* Mercer, §§ 1, 15, 20.

[4] Jones *v.* Weakley, 8 S. E. 721, § 24, n. 6; Thomas *v.* Lewis, 50 N. E. 809, § 24 a, n. 17; Milholland *v.* Whalen, 43 Am. St. Rep. 45, § 24 a, n. 22.

[5] Zeller *v.* Jordan, 105 Cal. 43, § 24, n. 8, § 26, n. 40.

[6] These cases with the sections to which they are erroneously attributed are as follows: De Hass *v.* Dibert, § 104; Pool *v.* Anderson, § 713 e, § 1092 b; Farmer's Nat. Bk. *v.* Sutton Mfg. Co., § 890.

[7] Delaware Co. *v.* Diebold & Co., § 10 a, n. 40; Bire *v.* Moreau, § 14, n. 54; Gerrish *v.* New Bedford Inst., § 24 b, n. 31; Warren *v.* Durfee, § 25, n. 35.

[8] International Bank *v.* German Bank, § 1 a, n. 3; Cronin *v.* Patrick Co., § 1 a, n. 3; Gibson *v.* Minet, § 4, n. 13; Bullard *v.* Bell, § 10 a, n. 37; Porter *v.* City of Janesville, § 10 a, n. 42; Strawbridge *v.* Robinson, § 13, n. 53; Towne *v.* Rice, § 14, n. 55; Corser *v.* Craig, § 16 a, n. 59; Cowperthwaite *v.* Sheffield, § 16 a, n. 65, § 18, n. 75; First Nat. Bank *v.* Dubuque S. R. R., § 18, n. 74, § 20, n. 82; Shand *v.* Du Buisson, § 20, n. 81; Poydras *v.* Delamere, § 22, n. 91; Camp's Appeal, § 24 a, n. 17; Amis *v.* Witt, § 24 a, n. 19; Stephenson *v.* King, § 24, n. 6, § 24 b, n. 30; Hill *v.* Stevenson, § 24 b, n. 28; Dole *v.* Lincoln, § 24 b, n. 28; Wells *v.* Tucker, § 24 b, n. 28; Dunbar *v.* Dun-

credits seventeen old cases to sections where they are not cited.[1] Nine old cases are cited as in reports where they are not to be found.[2] The citations of eight old cases are wrong as to the page of the report.[3] It may be conceded that an occasional fault of the kind set forth may be overlooked. But here there are too many to be excused. Nor are such errors to be treated as unimportant. For reasons apparent to every lawyer, the usefulness of a law book for working purposes is much impaired by them. There are also many cases cited only by a page in the opinion of the Court. Where it is desirable in this manner to make special reference to a part of the opinion, the initial page of the case should also be given. As to a number of cases, the citation is to a page, which is neither the first page nor in the opinion, but in the statement of facts, for which there is no justification.

Irrelevant and Misleading Cases. Among the new cases cited in the first chapter are several which seem irrelevant to the propositions in support of which they are cited, or so placed in the notes as to be misleading. *Dinley* v. *McCullagh*, 92 Hun 454, § 26, n. 39, is cited under a paragraph which states the proposition that if a check of the donor delivered as a *donatio mortis causa* is transferred by the donee for value, or in discharge of a debt, or has been paid by the bank before notice of the drawer's death, a court would not take it from the donee. The case is not in point. The check was not transferred by the donee, and it had not been paid. The donee claimed, not that there was a *donatio mortis causa*, but a good gift *inter vivos*, but the court held that there was no valid gift.

Bank v. *Brewing Co.*, 50 Oh. St. 151, and *Covert* v. *Rhodes*, 48 Oh. St. 66, are so placed in § 22, n. 91, as to indicate that they are opposed to the text and to earlier cases in the note, whereas they are in accord.

Section 24, n. 7, contains a quotation from the syllabus of *Ammon* v. *Martin*, 59 Ark. 191, that the delivery of a note by the owner on her death-bed to an agent designated by the donee to receive it under circumstances indicating an intention to make a gift either *inter vivos* or *mortis causa* is a sufficient delivery to pass the title to the note. Then the editor adds, "But this principle is held to apply only to savings banks, *Jones* v. *Weakley*, 99 Ala. 441." But there was no such holding in *Jones* v. *Weakley*. That case involved no question as to the delivery of a note, either to the donee or an agent, and it does not limit the application of the principle in *Ammon* v. *Martin*. It involved the question of the validity of a gift *causa mortis* by the delivery of a pass-book in a national bank, not to an agent but to the donee himself. It was held that, while delivery of a pass-book in a savings bank to the donee would be a sufficient delivery,

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bar, § 24 b, n. 28; Hatch *v.* Atkinson, § 24 b, n. 28; Burney *v.* Ball, § 24 b, n. 30; Darland *v.* Taylor, § 24 b, n. 30; Brabrook *v.* Boston, etc., Bank, § 24 b, n. 31; Clark *v.* Clark, § 24 b, n. 31; Powers *v.* Provident Ins. Co., § 24 b, n. 31; Stone *v.* Bishop, § 24 b, n. 31; Blasdell *v.* Locke, § 24 b, n. 31; Howard *v.* Windham Bank, 24 b, n. 31; Kerrigan *v.* Rantegan, § 24 b, n. 31; Irish *v.* Nutting, § 25, n. 35; Lawson *v.* Lawson, § 25, n. 36.

[1] Cronin *v.* Patrick Co., § 1; Cowperthwaite *v.* Sheffield, § 20; Stephenson *v.* King, § 24 a; Camp's Appeal, § 24; Dole *v.* Lincoln, § 24; McConnell *v.* Murray, § 24; Wells *v.* Tucker, § 24; Amis *v.* Witt, § 24; Dunbar *v.* Dunbar, § 24 a; Burney *v.* Ball, § 24 a; Darlard *v.* Taylor, § 24 a; Powers *v.* Provident Ins. Co., § 24 a; Stone *v.* Bishop, § 24 a; Blasdell *v.* Locke, § 24 a; Howard *v.* Windham Bank, § 24 a; Kerrigan *v.* Rautegan, § 24 a; Irish *v.* Nutting, § 26.

[2] The names of the cases, the reports and the sections where cited are as follows: Duncan *v.* Course, 3 Const. R. (So. Car.) 100, § 9, n. 32; Buckner *v.* Sayre, 17 B. Mon. 754, § 18, n. 74; Missouri Pacific R. R. Co. *v.* Councilmen, 38 Mo. 141, § 22, n. 91; Rice *v.* Dudley, 34 Mo. 392, § 22, n. 91; Duffield *v.* Elwes, 1 Bligh 409, § 24, n. 11; Burke *v.* Bishop, 27 Am. Rep. 567, § 24, n. 16; Millspaugh *v.* Putnam, 11 Abb. Pr. 380, § 24 a, n. 17; Chase *v.* Redding, 7 Gray 418, § 26, n. 45; Hamer *v.* Moore, 6 Ohio St. 239, § 25, n. 35.

[3] Porter *v.* City of Janesville, 3 Fed. 317, § 10 a, n. 42; *Ex parte* South, 3 Swanst. 391, §§ 16 a, n. 67, 23, n. 94; Brill *v.* Tuttle, 81 N. Y. 547. § 16 a, n. 68; Ray *v.* Simmons, 23 Am. Rep. 266, § 24 a, n. 23; Clark *v.* Clark, 108 Mass. 228, § 24 a, n. 27; Burney *v.* Ball, 24 Ga. 565, § 24 b, n. 30; Gardner *v.* Gardner, 22 Wend. 525, § 25, n. 32; Simmons *v.* Savings Society, 31 Ohio St. 530, § 26, n. 40.

such delivery of a pass-book in an ordinary bank would not, because the depositor did not thereby lose control over the deposit, and it was not the best available delivery. In § 24 a, n. 17, seven cases are cited to the proposition that "deposits in bank can likewise be the subject of a gift *inter vivos*." Of these cases three are not relevant. *Crawford* v. *McCarthy*, 159 N. Y. 514, involved only a legacy of money in bank. There is nothing relevant in the case. *Thomas* v. *Lewis*, 89 Va. 1, was a case of a gift *causa mortis*. It was held to be good as to other personal property, but not as to a gift of deposits in a national bank by delivery of a pass-book, and so, if it is relevant at all, it is opposed to the principle in support of which it is cited. *Citizens' Savings Bank* v. *Mitchell*, 18 R. I. 739, involved no gift *inter vivos*, but only a *donatio mortis causa*.

We have also found some of the old cases cited in the first chapter to be irrelevant, but to examine each case in order to ascertain how many there may be would be too great a task, and we have not undertaken it. At the end of § 24 a, n. 17, a case styled "*McConnell* v. *Murray*, 3 Ir. L. J. 668," is cited as contrary to the proposition that to establish a gift *inter vivos* of deposits in a bank, the evidence must be of the clearest and most satisfactory character. The case intended to be cited involved, not a gift *inter vivos*, but a gift *causa mortis*, and it is not contrary as to the question of evidence. As the note stood in previous editions, the case was put after the case of *Tillinghast* v. *Wheaton*, 8 R. I. 536, and other cases, and is opposed to the decisions in those cases. In this edition new matter and new cases have been added to the note, but instead of leaving the case cited as "*McConnell* v. *Murray*" where it was, it was dropped to the end of the note, and thus cited as opposed to a new proposition and a new case to which it is not opposed. The citation of this case is moreover erroneous in several particulars: the name of the plaintiff and the number of the page of the report are wrong, and the report itself is cited in such an unfamiliar manner as to cause difficulty in finding it. There is a publication the full title of which is "The Irish Law Times and Solicitor's Journal," but it is known in reference catalogues and cited as "Irish Law Times" or "Ir. L. T." The case is to be found in the third volume of that journal at page 568 under the name of *McGonnell* v. *Murray*. The report in the "Irish Law Times" is a meagre and unsatisfactory one of only a column, the decision consisting of fourteen lines, while, more than five years before the first edition of Mr. Daniel's book, the case was fully reported in Irish R. 3 Eq. 460, the opinion of the court filling seven pages. If the editors of this edition had verified the citation before changing the order of the note, they would have been obliged to correct the reference and also to leave the case in its old place in the note. This careless manner of interpolating new matter and new cases in the notes can hardly be regarded as a trifling defect.

The learned author gives the impression in his letter that we found but two cases, which the last edition of his book continues to cite as reported in Law Journals long after they have been published in the regular reports. It is true we named only two cases, but we stated that there are many cases cited in this manner.

Another minor defect is the manner in which the late English reports are cited. For instance, in § 139, note 44, a case is cited as in "L. R. App. Cas. 90 (1896)." We called attention to the fact that it should be [1897] A. C. 90. In his letter the author admits the error in the note, but commits another when he says that "to be nicely accurate this citation should have been A. C. (1897) 90." The mode of citation of these reports in the form we have given is prescribed at the head of the Table of Cases in each volume of the reports.

There are counter-criticisms of the learned author to which we might make answer if we wished to be controversial, but our only object is to state what we conceive to be the truth regarding the work put in our hands to review. We did not intend to be unfair or unkind, and we readily acknowledge that some expressions of impatience with certain features of the book might have been omitted. We also regret it, if we gave the impression that we regarded the learned author's book as not entitled to respect. We thought the work had been sometimes over-praised, not that it was without merit. On the contrary,

we believe that the original text, by reason of its attractive style, its comprehensive scope, and its independence, is one of the best of the larger treatises on the subject. But while we cheerfully concede this, we are obliged to differ with the learned author as to his treatment of a number of subjects, and to express the opinion that in the course of several editions, and particularly in the last edition, the original text and notes have been overlaid with matter, often injudiciously selected, and so carelessly arranged that the total result is not satisfactory. The conviction deepens that the time had come for a reconstruction of the work.

We should be sorry to do injustice to any legal writer, but we consider it the duty of a law review to encourage the making of first-class text-books. This end can never be attained by such indiscriminate praise as characterizes many of the reviews in law magazines. Nor can we agree that it is a defense to a criticism of a law book to say that it is up to the average. We think it has been shown that the work on the present edition is not up to the standard of fairly good books. But however this may be, we submit that it is the right and the duty of the profession to judge a book by the standard of the best type of law books, whether the best happen to relate to the particular subject or to other subjects. And not only the text, but the notes, and the judgment shown in the citing and arrangement of cases should be considered in determining the grade of the book. J. D. B.

Foreign Investments in Time of War. — A question on which there is little authority, but which will undoubtedly be of the utmost importance in the future, is the effect of war on international business relations. A very learned and valuable discussion of some phases of this question is contained in a recent article. *Foreign Investments in Time of War*, by Robert Agar Chadwick, 20 L. Quart. Rev. 167 (April, 1904). After dealing very cursorily with the right to confiscate, the writer devotes some attention to a discussion of the effect of war on foreign loans, with particular reference to debentures. The second part of the article, however, which is taken up with a consideration of the legal position of the foreign shareholder of a corporation in time of war, is of more interest to the American reader. On this question he has found but two views expressed. One writer maintains that the rights and liabilities of the shareholders are suspended during the war. 1 Lindley on Companies (6th ed.) 53. Another writer has argued that enemy shareholders drop out and are entitled to the value of their shares on the day war breaks out. Baty, International Law in South Africa, ch. VI. The chief analogy is to the case of partnership. A partnership is dissolved by the outbreak of hostilities, since the power of mutual control is gone, and since a person should not reap the benefit of his partner's trade in the enemy's country: suspension is impossible since it is impossible for the partners to pick up the threads of the business where they were abandoned. *Griswold* v. *Waddington*, 16 Johns. (N. Y.) 438. Since the control of a shareholder is slight and seldom exercised by foreigners, and since his liability is limited and he can in addition generally sell even during the war, the writer argues that the first of the reasons given for dissolution of partnership is inapplicable. The inconvenience arising from holding the membership dissolved would be greater, he says, than the hypothetical injustice of continuing his liability in the company over which he cannot exercise the small control given him. The other reasons given for dissolution of partnerships do not apply to corporations, since the rights and liabilities of a shareholder can be suspended. The directors can carry on the business in the interim and profits earned during the war may be withheld.

The writer, however, takes one step more. He contends that the rights and liabilities of the shareholder need not be suspended during the war, though his right to sue must be. The law allows interest to be paid on a loan even to the alien government and also rent for the use of foreign land. From this he argues that it is not positively illegal to share in the profits of trade carried on in the enemy's country. The shareholder, if he remains one, must hold the

share at its value at the end of the war, whether decreased or increased. Here at least he may to a limited extent share in profits. In addition he would as a practical matter have to pay any call assessed after the end of the war, because of the impossibility of showing it resulted from losses incurred during the war. So unless he is given full rights to profits made during the war, he would be subjected to all the risk of loss with a chance for only a small share of the profit. Consequently the writer maintains that, generally speaking, shareholders should remain shareholders in fact, entitled to profits earned as well as liable for losses incurred during hostilities. This argument, it is submitted, strikes at one of the fundamental reasons for the dissolution of partnerships. If it is not illegal to share in profits of trade in the enemy's country, then the only reason for the dissolution of partnerships is that the power of mutual control is gone. In many partnerships this power does not exist. It seems, however, that the writer's views are in accordance with the modern tendency to minimize the effect of war on commercial relations and, though he has taken a long step, it is quite possible that the courts will follow him.

LIFE, BIRTH, AND LIVE-BIRTH. — Few attempts have been made by legal writers to deal with this subject, either as an original question, or in the light of the decided cases. The propositions of law involved seem to be, for the most part, in an unsettled state, and a cursory examination of the authorities affords the reader little enlightenment. Such a comprehensive treatment of these questions as appears in a recent article is, therefore, both timely and noteworthy. *Life, Birth, and Live-birth*, by Stanley B. Atkinson, 20 L. Quart. Rev. 134 (April, 1904). The writer displays a wide knowledge of these topics, not only in their legal, but also in their physiological aspects, his treatment of them being scholarly and exhaustive, and supplemented by a careful collection of the English authorities. The subject is dealt with in five of its important phases. I. A Child. In the criminal law the stage of development at which a fœtus becomes a child is important. For example, it is only after this stage of pregnancy that execution will be stayed in the case of a sentenced murderess. Again, a definition of a child is necessary under statutes dealing with the concealment of the birth of children. The definition suggested is that a child is a human fœtus which is born, alive or dead, at such stage of uterine development as experience shows is necessary for capacity to survive birth, namely, at least five calendar months after conception. II. Birth. It is well settled that the instant of nativity is when the last part of the body of the fœtus is wholly extruded from the body of the mother. The after-birth, which is not legally considered as an integral part of the child, need not be expelled nor the cord be severed. III. Live-birth. The child begins its existence as a legal personality when the fœtus is born alive into the world. Up to this time it is not a subject of murder; consequently a fixed test of the consummation of live-birth is of great practical importance in the cases of infanticide that so often arise. The common judicial view is that the child must have a postnatal separate and independent existence. What physiological facts are sufficient to constitute this independent vitality is not determined by the cases. It would seem that at least a postnatal continuance of the circulation must occur, although in practice still-birth, which may be accompanied by continuance of the circulation, is generally regarded as dead-birth, and respiration is taken as the rough test of live-birth. IV. The Proof. The presumption of the law is that a child is born dead. Live-birth must be established by valid evidence. Circumstantial evidence, as to the condition of the body for example, is usually sufficient where the child has lived long enough for respiration to become fully established. Where this is not the case, however, live-birth can ordinarily be efficiently proved only by the direct evidence of one present at the parturition as to the birth and the subsequent exhibition of a sign of life. V. The Status of the Fœtus *en ventre sa mère*. The fœtus acquires a status in civil law much earlier than its legal personality is recognized in criminal law. For proprietary rights the fœtus is considered as a potential child at every stage of gestation.

SURVIVORSHIP. — The Iroquois Theatre fire has called forth a recent article on the question of survivorship in a common disaster. *Problems of Survivorship*, by Clarke Butler Whittier, 16 Green Bag 237 (April, 1904). After stating the law to be at last well settled in England and America that there are no presumptions of survivorship, but that the person having the burden of proof must, in the absence of evidence, fail, the writer lays down a general rule derived from the authorities, by which one can readily determine in what cases there is a burden of proving survivorship and upon whom it rests. His proposition is that "any claimant has the burden of proving survivorship so far as it is essential to his own chain of title, but he need not establish it for the purpose of disproving his opponent's chain of title, even though the latter, if established, would be superior to his own." For example, where devisee and testator perish in a common disaster the heirs of the latter succeed without proving survivorship of the testator. The rule stated is a simple one, and arises naturally from principles of common law pleading, but it has not hitherto been laid down in this connection with such accuracy, nor has it always been recognized by courts in dealing with the cases. The article further commends itself to the reader by its full collection of authority and the able manner in which the cases are discussed.

ACTUAL DECISION IN THE MERGER CASE, THE. *Bruce Wyman.* 16 Green Bag 258.

ADVOWSONS AND CHARITABLE TRUSTS. *Anon.* 116 L. T. 495.

"AFFECTING" OF CONTRACTS BY STATUTE, THE. *E. F.* Discussing how far statutes which give rise to and apportion new liabilities between persons of different classes, affect contracts between those persons relating to the matter in question. 116 L. T. 470.

AMENDMENT OF CASE STATED. *Anon.* Discussing ways in which amendments of cases stated for a higher court may be made. 68 Justice of P. 169.

ASSIGNMENT OF COUNSEL, THE. *H. N. G.* Arguing that counsel appointed to defend indigent prisoners can recover from the county the value of his services. 8 Law Notes (N. Y.) 246.

BANKERS' LIENS ON SECURITIES PLEDGED TO THEM BY BROKERS. *Charles M. Holt.* Discussing Lord Sheffield *v.* London Joint Stock Bank, 13 App. Cas. 333. 3 Can. L. Rev. 144.

CHARACTER-EVIDENCE IN CIVIL CASES. *William Trickett.* Discussing Pennsylvania law. 8 Forum (Dickinson) 165.

CHARACTER-EVIDENCE IN CRIMINAL CASES. *William Trickett.* Discussing Pennsylvania law. 8 Forum (Dickinson) 121.

CIVIL JURY, THE. *A. Caperton Braxton.* 38 Am. L. Rev. 220.

CODIFICATION OF THE DOCTRINE OF RESCISSION. *Francis M. Burdick.* 4 Columbia L. Rev. 264.

COMPENSATION TO YEARLY TENANTS. *Anon.* Discussing cases where land occupied by yearly tenants is taken under Act of Parliament. 68 Justice of P. 170.

CONCERNING THE NEED OF CREATING ADVOCATES OR DEFENDERS FOR THE ACCUSED. *W. D. Sutherland.* 3 Can. L. Rev. 215.

CONSTITUTIONAL LAW OF THE UNITED STATES AS MOULDED BY DANIEL WEBSTER. *Everett P. Wheeler.* 12 Am. Lawyer 148.

CONSTRUCTION OF STATUTE MAKING IT CRIMINAL FOR MEMBERS OF CONGRESS TO SELL THEIR INFLUENCE. *Anon.* 58 Central L. J. 341.

CRIMINAL LIABILITY OF PUBLICANS FOR THE ACTS OF SERVANTS. *Anon.* Consideration of the question as governed by English statutes. 68 Justice of P. 159.

"DAYS OF GRACE." *Anon.* Discussing the subject in connection with fire insurance and bills of exchange. 116 L. T. 542.

DOCTRINE OF CONTINUOUS VOYAGES, THE. *Charles B. Elliott.* 13 Yale L. J. 289.

EARLY AMERICAN MARRIAGE LAWS. *R. Vashon Rogers.* 3 Can. L. Rev. 133.

EFFECT OF SLAVERY UPON THE CONSTITUTIONS AND LAWS OF THE UNITED STATES AND OF THE STATE OF ALABAMA, THE. *Edward De Graffenreid.* 12 Am. Lawyer 151.

EXTRATERRITORIAL POWERS OF RECEIVERS: Rights of Action in Foreign Courts. *Walter J. Lotz.* 58 Central L. J. 284.

FOREIGN INVESTMENTS IN TIME OF WAR. *Robert Agar Chadwick.* 20 L. Quart. Rev. 167. See *supra.*

FRENCH JURY SYSTEM, THE. *Simeon E. Baldwin.* 2 Mich. L. Rev. 597.

HINDU AND MAHOMEDAN RELIGIOUS ENDOWMENTS — WAKFS. *Anon.* 14 Madras L. J. 1.

INTENT TO DECEIVE OR DEFRAUD. *Herbert Stephen.* Discussing the meaning of the words "with intent to deceive or defraud," as they occur in the English Larceny Act. 20 L. Quart. Rev. 186.

INTER-INSURANCE. Its Legal Aspects and Business Possibilities. *Robert J. Brennan.* 58 Central L. J. 323.

IS CONGRESS A CONSERVATOR OF THE PUBLIC MORALS? *William A. Sutherland.* Commenting adversely upon a recent decision of the United States Supreme Court that lottery tickets are articles of commerce. 38 Am. L. Rev. 194.

JAPANESE LAW AND JURISPRUDENCE. *A. H. Marsh.* 38 Am. L. Rev. 209.

JOINT STOCK CORPORATIONS LAW. *Joseph Bawden.* Suggesting a national incorporation law. 3 Can. L. Rev. 147.

JUDICIAL HISTORY OF INDIVIDUAL LIBERTY, THE. PART IV. *Van Vechten Veeder.* 16 Green Bag 247.

JUSTICE OF THE PEACE, THE. *Anon.* A plea for the retention of the office in the judicial system. 1 North Carolina J. of L. 157.

JUSTICES EQUALLY DIVIDED IN OPINION. *Anon.* Discussing the courses open to justices in such a case. 68 Justice of P. 182.

KEEPING OILS FORBIDDEN BY POLICIES OF INSURANCE. *W. W. Thornton.* 58 Central L. J. 343.

LEAVES FROM A LAWYER'S NOTE BOOK. OATHS ADMINISTERED WITHOUT THE USE OF THE BIBLE. *Charles W. Tillett.* 1 North Carolina J. of L. 166.

LIABILITY OF MUNICIPALITY FOR FAILURE OF ITS OFFICERS TO ENFORCE ORDINANCES. *John G. Farmer.* 40 Can. L. J. 253.

LIFE, BIRTH, AND LIVE-BIRTH. *Stanley B. Atkinson.* 20 L. Quart. Rev. 134. See *supra.*

LOGICAL CONVEYANCING. *T. F. Martin.* A tribute to "Davidson's Precedents." 20 L. Quart. Rev. 195.

MODERN LAW OF CHARITIES AS DERIVED FROM THE STATUTE OF CHARITABLE USES, THE. *Rupert Sargent Holland.* 52 Am. L. Reg. 201.

NATIONAL SUPERVISION OF INSURANCE AND PAUL *v.* VIRGINIA. *John W. Walsh.* Discussing the power of Congress to regulate insurance as commerce or otherwise. 38 Am. L. Rev. 181.

NATURAL-BORN CITIZEN OF THE UNITED STATES. Eligibility for the Office of President. *Alexander Porter Morse.* 66 Albany L. J. 99.

NEGLIGENCE OF RAILWAY COMPANIES IN CANADA. Railway Act of 1903. *C. H. Masters.* 40 Can. L. J. 215.

NEW TRIAL AND VENIRE FACIAS DE NOVO: A DISTINCTION. *Murray Allen.* 1 North Carolina J. of L. 171.

OBSERVATIONS ON THE ART OF ADVOCACY. *David Dundas.* 3 Can. L. Rev. 171.

PEONAGE CASES, THE. *William Wirt Howe.* 4 Columbia L. Rev. 279.

PHYSICIAN AS AN EXPERT, THE. I. *H. B. Hutchins.* 2 Mich. L. Rev. 601.

PHYSICIAN ON THE WITNESS STAND, THE. *F. M. Hagan.* 49 Ohio L. Bulletin 195.

PRINCIPLE AND LIMITATIONS OF LABOUR RIGHTS. *Frank E. Hodgins.* 24 Can. L. T. 91.

PROBLEMS OF SURVIVORSHIP. *Clarke Butler Whittier.* 16 Green Bag 237. See *supra.*

PROCEDURE IN THE COUNTY COURTS, THE. I. *Anon.* 38 Ir. L. T. 111.

PROPOSED NATIONAL INCORPORATION LAW, A. *Horace L. Wilgus.* 2 Mich. L. Rev. 501.

PROPOSED REFORMS IN MARRIAGE AND DIVORCE LAWS. *Amasa M. Eaton.* 4 Columbia L. Rev. 243.

RECENT FOREIGN COPYRIGHT LAW. *Anon.* 116 L. T. 516.

RECORDATION AND ACKNOWLEDGMENTS. *John Garland Pollard.* Discussing construction put by Virginia courts upon a state statute. 9 Va. L. Reg. 935.

RELATION OF JUDGES TO GRAND JURIES, THE. *J. B. Mackenzie.* 40 Can. L. J. 255.

RUSSIAN CIVIL LAW. *William W. Smithers.* 52 Am. L. Reg. 137, 213.

SALES OF LEASEHOLDS BY PERSONAL REPRESENTATIVES. *Anon.* Discussing the length of time within which the right of sale may be exercised. 38 Ir. L. T. 135.

SINGING *v.* MIMICRY. *Anon.* Criticising Bloom *v.* Nixon, 125 Fed. Rep. 977. 8 Law Notes (N. Y.) 249.

STATUTORY ESTATES IN PLACE OF AN ESTATE TAIL. *Albert Martin Kales.* 13 Yale L. J. 267.

SUBSTITUTED FREIGHT. *H. Birch Sharpe.* Discussing the right of the underwriter, in case of the destruction of the original cargo, to freight earned on a substituted cargo. 20 L. Quart. Rev. 160.

TEACHING OF SIR HENRY MAINE, THE. *Paul Vinogradoff.* 20 L. Quart. Rev 119.
ULTRA VIRES AND ESTOPPEL. *Anon.* 44 Leg. Adv. 53.
VALIDITY OF AGREEMENT FOUNDED ON A NEW CONSIDERATION BUT GIVEN IN PAYMENT ON ILLEGAL CONTRACT. *Anon.* 58 Central L. J. 321.
WHETHER A CONSIDERATION IS NECESSARY TO A WAIVER. *Colin P. Campbell.* 58 Central L. J. 264.
WHETHER AN ATTEMPT TO BRIBE AN OFFICER WHO IS WITHOUT AUTHORITY TO ACT IS A CRIMINAL OFFENSE. *Anon.* Commenting upon one of the recent St. Louis bribery cases reported in 77 S. W. Rep. 560. 58 Central L. J. 281.

II. BOOK REVIEWS.

THE POLICE POWER. Public Policy and Constitutional Rights. By Ernst Freund, Professor of Law in the University of Chicago. Chicago: Callaghan & Company. 1904. pp. xcii, 819. 8vo.

In 1827, in the opinion in the case of *Brown* v. *Maryland*, Chief Justice Marshall introduced into our law the term "police power." A study of that case and the circumstances surrounding it leads to the conclusion that Marshall used the phrase merely as a synonym for the well-known "police laws," "regulations of police," etc. At any rate the term did not reappear in a judicial opinion until ten years later, after Marshall's death, in the case of *New York* v. *Miln*. By that time the abolition controversy had made the term familiar over the entire country. It had been seized on by the daily papers and political speakers, to express the "residuary sovereignty" of Madison. It is not surprising that this popular and wide-spread use had a marked effect upon the courts. In the License Cases we find Chief Justice Taney declaring that the police power of a state is "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." From this time on the police power has been given every phase of meaning, from the extended one of Taney to that of Mr. Hastings, who states that the "police power is a fiction."

The confusion in the use of the term has never been cleared up by the text-writers. The nearest approach is made in the present work by Professor Freund. The author explains his conception of the police power as follows: "The State places its corporate and proprietary resources at the disposal of the public by the establishment of improvements and services of various kinds; and it exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power." For the sake of clearness Professor Freund excludes from the police power all forms of State activity which do not operate by restraint and compulsion. But general statements are of little assistance in the discussion of this troublesome branch of our law. It is only by a detailed examination of statutes and decisions that this power can be at all understood. This examination is very carefully made by the present author. For this purpose he makes a threefold division of the spheres of state activity: first, a conceded sphere, affecting safety, health, and morals; second, a debatable sphere, that of proper production and distribution of wealth, public convenience and advantage; third, an exempt sphere, that of moral, intellectual, and political movements. Professor Freund regards the first sphere as constituting the police power in its primary sense. Here is found an ever increasing amount of restrictive legislation, governed by principles which have become well established and which constitute a distinct branch of Constitutional Law. In the second sphere the police power is revealed, not as a fixed quantity, but as the expression of social, economic, and political conditions. Here it would be impossible to formulate general rules, and the examination of the author consists in showing what has been done, what has been attempted and has failed, and what is now being

accomplished. The last sphere embraces those individual rights which are secured by constitutional guarantees. Religion, speech, and press are exempt from police interference except to a slight degree in the furtherance of good order and morality. So far, however, little difficulty has been encountered in the mutual adjustments of these interests.

In the opinion of the reviewer much of the confusion in the subject has come from extending the term "police power" to embrace the second and disputed sphere of state control. But if the popular misuse of the term has become too deeply engrafted in legal works and opinions, to allow a more restricted use of the phrase, then the careful and definite division, now made prominent for the first time in a text-book, is absolutely essential to clearness.

In a few points one regrets that the discussion of the author is not more elaborate. The treatment of the police power in connection with the "Fourteenth Amendment" covers only two pages, and the "Commerce Clause" does not seem to have its just prominence. Still, in general, the treatment by Professor Freund is detailed and exhaustive. The author is to be congratulated on producing what is perhaps the best work on the subject.

TEXT-BOOK OF THE PATENT LAWS of the United States of America. By Albert H. Walker. Fourth edition. New York: Baker, Voorhis and Company. 1904. pp. cviii, 755. 8vo.

When the third edition of this work was published in 1895 the author stated in his preface that except in the event of the enactment of a new system of patent statutes "a necessity for another edition of this book cannot now be foreseen and, therefore, I present this edition to the bench and to the bar as probably my final contribution to the literature of the patent law." Since that time, however, Congress has amended the patent laws very extensively and has thus impelled Mr. Walker to issue this year the fourth edition; and he now hopes to continue his work from time to time in the future.

In all, six statutes have been passed, but the most important changes in the patent laws since the publication of the third edition are contained in the Patent Act of 1897, 29 Stats. at Large, Chap. 391, and in the Patent Act of 1903, 32 Stats. at Large, Chap. 1019. Before the Act of 1897, a prior patent or publication, in order to invalidate a patent or justify the refusal of an application, must have been made earlier in date than the time when the applicant made his invention. By the Act of 1897, the anticipation is sufficient if the device was patented or described before the date of the applicant's invention, or two years before his application.

Before the Act of 1897, if an invention were patented in a foreign country and also in the United States and the patent in a foreign country lapsed before that in the United States would terminate, it was held that the patent monopoly in the United States must cease at the same date as the monopoly in a foreign country. By the Act of 1897, the law on this point is changed, so that no patent shall be declared invalid by reason of its having been first patented in a foreign country, provided application for a patent in this country be made within seven months of the application in a foreign country.

One other important change was made by the Act of 1897. A uniform statute of limitation was established for suits and actions brought for the infringement of patents. There was a limitation to suits or actions previously, for it had been held by the Supreme Court that the statutes of limitation of the separate states should apply in suits, but it is certainly more satisfactory that the system should be uniform.

By the Act of 1903 the requirement that an application be made in this country within seven months after an application in a foreign country in order to secure the benefit of the Patent Act of 1897, has been changed so that the inventor is now given twelve months within which to apply for a patent in this country. By the same act, a change is made whereby the benefit of a *caveat* is extended to any person, and is no longer limited to a citizen of the United

States. These statutes are so recent that they have not been subject to many adjudications by the courts, and, therefore, the embodiment of these changes in the law in Mr. Walker's book is timely and should be of assistance.

Since the publication of his third edition, some two thousand patent cases have been decided. Very wisely Mr. Walker omitted from his new book all of those decisions which were confined purely to questions of fact, but in the new edition he has included seven hundred recent cases which contain modifications of the patent law.

This edition represents probably the best modern text-book on the law of patents, and is the only treatment of the modern American law of patents. It is concise, well arranged, and contains citation and discussion of all the important cases. It is not so exhaustive as "Robinson on Patents," which was published in 1890, but is, perhaps, for that reason, more useful. It is certainly of value to the profession to have so thorough and well-considered a work confined within the limits of a single volume. S. H. E. F.

A Treatise on Special Subjects of the Law of Real Property. Containing an Outline of all Real-Property Law and more elaborate treatment of the subjects of Fixtures, Incorporeal Hereditaments, Tenures and Allodial Holdings, Uses, Trusts and Powers, Qualified Estates, Mortgages, Future Estates and Interests, Perpetuities, and Accumulations. By Alfred G. Reeves, Professor of Law in the New York Law School. Boston: Little, Brown and Company. 1904. pp. lxv, 913. 8vo.

In the introductory portion of this book the author discusses the subject of fixtures and other property which may be real or personal according to circumstances, and also gives an outline of the subject of real property, in which he briefly describes the various subdivisions as they are later to be discussed in his treatise. In this outline we learn that the author has divided the whole subject into four main divisions: kinds of real property, holdings of real property, estates in real property, title to real property. The first and second divisions are complete in this volume. Of the third, two subdivisions, according to the classification of the author, estates as to quantity and those as to number and connection of the owners, yet remain undone. The fourth division is not touched upon in this volume. The author, in his preface, however, promises that the parts as yet uncovered will be treated in a continuation to be forthcoming within the next three or four years.

The outline of the treatise is well arranged and makes possible the logical development of the subject, which is a distinguishing merit of the work. His method of presentment is not a compilation of statements of cases, but rather a statement of the law according to his own conclusions. In one respect, however, the work must be considered defective. Points of great importance, but doubtful in the law, the author is often content to cover without a sufficient indication of the uncertainty, and too often without detailed reasoning in support of his own conclusions. A text writer may safely leave much of the reasoning to be supplied by the reader, if the law is stated aptly and with logical sequence; this the author has in the main done exceedingly well. But there are always crucial questions in which the reader may feel at a loss, unless he is himself thoroughly acquainted with the questions. It is in the treatment of these crucial and often doubtful questions, upon the sound elucidation of which so much depends for a comprehension of the logical consistency of the whole, that the reader has a right to expect the writer to lend the aid of his own originality, perception, or investigation. In this we feel that the author has not done himself the justice due to his acquaintance with the subject, of which the soundness of his work furnishes ample evidence. The most striking quality of the book is, perhaps, its uniform and refreshing lucidity. Seldom, indeed, is it wanting in clearness of exposition. Too much, the critic is inclined to feel, cannot be said in commendation of this quality, the lack of which is too often a sadly marring feature in legal text-books of

real excellence in other respects. The book does not purport to contain an exhaustive collection of authorities, but a sufficient number of citations are given to support the development of the work. The New York codifications are added in separate notes, so as to make the treatise of especial value to the New York practitioner. These are not so extensive, however, as to intrude unduly upon the uniformity of the work and are so separated as to justify the hope of the author that the text may be of practical value to those who are not concerned with special New York law. On the whole, the treatise may be considered a contribution of value. Its completion will be awaited with anticipation.

SELECT CASES BEFORE THE KING'S COUNCIL IN THE STAR CHAMBER. Edited for the Selden Society by I. S. Leadam. Being Vol. 16 of the Publications of the Selden Society for 1902. London. 1903. pp. cliv, 339.

The belated volume of the Selden Society for 1902 has appeared, and is as scholarly, if not as generally interesting or valuable, as its predecessors. It serves to illustrate the fundamental departure which the Society has been making of late years — always excepting Mr. Maitland's admirable Year Books — from its original purpose and plan, which was to publish the early materials for legal history. These Star Chamber papers (it is misleading to call them "cases" as neither opinion nor judgment is given, for the best of reasons) are of no legal interest whatsoever, though they possess considerable interest for the social historian, and throw a little light on the nature of an institution which died and left no sign. The Star Chamber was the vermiform appendix of the King's Council, notable only when inflamed, and excised for the safety of the body politic. Real reports of early cases there decided — and there are many volumes of them in manuscript — would be of legal interest; but a labored study of the institution itself is to the lawyer, at least, mere fruitless antiquarianism. The introductions to the Society's publications were intended to be subordinate to the text. Mr. Leadam's Introduction, fortunately, is the principal feature of the book, and is a masterly essay on the Star Chamber, its history, process and pleadings, composition and jurisdiction; and a comment, historical, social, and genealogical, on the stories told by the papers printed.

To say that this introduction will be warmly welcomed by students of English history in the earlier Tudor times is a moderate statement. It disposes authoritatively of the notion, not lately much urged, that the Court of Star Chamber owed its origin to the Statute of 3 Henry VII. It settles certain other obscure constitutional questions, and it throws valuable light on the social history of the times. But where are the early sources we have been so long promised? The series of ancient rolls would fill a small world; why can we not have printed the rolls of a complete eyre of the fourteenth century, to compare with the Pleas for Gloucester? If not from the unpublished Year Books, then from the rolls let us get an insight into the development of the law in Richard's day. Or if that is asking too much, let us have more Select Civil, Criminal, and Manorial pleas. Can no one but Professor Maitland edit such things?

But it seems ungracious to find fault when such admirable work of its kind is given to us — of a kind, too, which is very probably more generally desired than the strictly legal work. Mr. Leadam's work deserves, and should receive, the warmest commendation. J. H. B. JR.

ENGLISH AND INDIAN LAW OF TORTS. By Ratanlal Ranchhoddas and Dhirajlal Keshavlal. Second Edition. Bombay: The Bombay Law Reporter Office. 1903. pp. civ, 581. 8vo.

The first edition of this work, which appeared in 1897, has apparently been of great service to the profession in India. Its excellence as a general treatise upon the subject combined with its special treatment of Indian cases and the

peculiarities of the Indian law created a demand for it which soon exceeded the supply and led to the production thus early of a second edition. The authors have adhered rather closely to the plan of the first edition, their aim being to bring the work down to date rather than to remedy any acknowledged defects. They have further increased the serviceability of the work by making the index more exhaustive, and by adding an introduction which consists in a concise summary, covering about fifty pages, of the law discussed in the text.

The general plan of the work is one more frequently followed in text-books on criminal law than in those on torts. The general principles are considered in the preliminary chapters and are applied later in the treatment of the various torts under separate headings. The method of presenting the subject is a common one, the discussion of principles being followed by illustrative cases taken from the reports. A great many Indian cases are given, and peculiarities of the Indian law and conflicts of authority between the various Indian courts are carefully pointed out. The names of leading cases appear in black type. The authors have drawn heavily upon other text-writers for principles, and have made little or no attempt to set forth views of their own. Their work in recording the opinions of others, however, and in stating the law as laid down in the cases shows great care and industry. The work is more comprehensive than many other text-books on the subject. It treats of torts in the master and servant, and principal and agent relations, of infringement of patent and copyright, of liability of carriers and innkeepers, and of several other subjects frequently considered in separate treatises.

The interest of the American reader in the book is of course centred upon the peculiar phases shown by the Indian law of torts. It is rather surprising to find how few of these peculiar phases there are. One of the most noteworthy is the jealousy with which the right to privacy is guarded in most Indian jurisdictions. It is interesting again to note how well old principles apply to the unfamiliar situations which Indian life affords. But on the whole one finds the Indian law of torts little different from that of any other country where the common law is in force.

BRIEF UPON THE PLEADINGS IN CIVIL ACTIONS, AT LAW, IN EQUITY, AND UNDER THE NEW PROCEDURE. By Austin Abbott. Second Edition. In two volumes. Rochester: The Lawyers' Co-operative Publishing Company. 1904. pp. xxxiii, 1–867; xvii, 869–2120. 8vo.

The authors of this work have aimed to produce a ready-reference manual for the trial lawyer, and they have succeeded. Since the first edition appeared in 1891 it has been recognized as a most serviceable book, perhaps the most serviceable book of its kind in existence. In general scope the present edition follows the lines of the first. One new chapter has been added, dealing with amendments and changes. But most of the increased space in the new edition, which is more than twice the size of the old, is accounted for by the improvements in the citations. These are fuller and more explicit. Not only are many new cases cited, but the old ones are more carefully distinguished and classified. Altogether, the work as it now stands is an adequate treatise on the matter and the manner of pleadings at common law, in equity, and under the codes of the various states.

The main virtues of a good book of this kind are three: it should be well arranged; it should be comprehensive; and it should be reliable. The first of these requirements this work abundantly satisfies. In the text the subjects are arranged and discussed in the order in which questions upon them would naturally arise in the progress of an action. The table of contents is well provided with headings and sub-headings. In the volume on issues of fact, as well as the one on demurrer, these are treated alphabetically. In the index the rules in reference to any one subject, without regard to the stage of proceeding at which they prevail, are collected under that subject.

As regards comprehensiveness and reliability, it is obvious that only one who

has used a book long and constantly can speak with certainty. The book is meant for the trial lawyer, and only a trial lawyer can really form an opinion of its merits in this regard. The publishers do not claim that the work is exhaustive; but it would seem as if a book of twenty-two hundred pages on the subject of pleading must come reasonably near that desirable end. As regards the question of reliability, some considerable verification of the citations has been made with satisfactory result.

A TREATISE ON STOCK AND STOCKHOLDERS covering watered stock, trusts, consolidations and holding companies. By Arthur L. Helliwell. St. Paul: Keefe-Davidson Company. 1903. pp. xxxiii, 1071. 8vo.

This is a thoroughly modern, practical book upon a live and growing subject. Though not purporting to cover the whole field of corporations, it deals in a very comprehensive fashion with many of the most important groups of questions growing out of corporate existence. The extensive formation of business corporations in the last few years has made the subject of corporate stock as a species of property a very important one in the business world. Thus a large portion of this book is devoted to a consideration of the different branches of this phase of the legal status of stock, covering nearly every important question that may concern the subscriber, purchaser, owner, or dealer. The chapters on "Transfer of Shares" and on "Watered Stock" deserve especial mention. Woven in with, and following upon this discussion, is a consideration of the rights, duties, and liabilities of stockholders, and the methods of their enforcement. Particular emphasis is laid upon stockholders' suits and the liabilities of stockholders to the corporation, and to its creditors. As a matter closely related to these general topics, the author includes an excellent chapter upon "Trust Agreements, Consolidations, and Holding Companies." This chapter treats briefly the different phases taken by the so-called trust of recent years, and touches upon the many varied problems that have arisen in the great mass of litigation which has clustered about this subject. It closes with a brief consideration of the Northern Securities Case before the Circuit Court. The immense importance of this subject and its present undeveloped condition render a discussion of this kind of considerable value. The book is well printed, well arranged, and its text carefully divided into sections and paragraphs in accordance with a thorough topical analysis. This work will be found to be a practical working treatise, an excellent reference work upon all the topics included within its scope. W. H. H.

THE CONVEYANCE OF ESTATES IN FEE BY DEED. Being a statement of the principles of law involved in the drafting and interpretation of deeds of conveyance and in the examination of titles to real property. By James H. Brewster. Indianapolis: The Bobbs-Merrill Company. 1904. pp. lxxvii, 607. 8vo.

This is a convenient practical manual of ordinary conveyancing. It is devoted chiefly to a discussion of the elements and the essential parts of the deed, considering their necessity, their effect, and their interpretation. Each element is discussed with considerable detail, and its relation to the remainder of the instrument carefully indicated. Many of the questions of interpretation that are frequently arising in cases of defects and inconsistencies in the deed are fully considered, and the rules of construction which have arisen to govern such cases are carefully stated. The difficulties of conveyancing are not so much those arising out of the drawing and the execution of the instrument — for that is ordinarily a simple matter — as they are those resulting from the carelessness and the errors of previous conveyancers. In the examination of a title questions of this nature are often most troublesome. It is in disentangling difficulties of this character that this volume is intended to be of service, and in

this field it will prove most helpful. It brings into readily accessible form the principles which govern in the solution of all such problems, and discusses them intelligently, with citations of leading or representative cases. The book closes with brief chapters on the examination of titles and the new Torrens system of title registration. It should prove an excellent text-book for conveyancers and for all who are in any way concerned with the problems of real property law. W. H. H.

TRUSTS OF TO-DAY. Facts relating to their promotion, financial management, and the attempts at state control. By Gilbert Holland Montague. New York: McClure, Phillips, & Co. 1904. pp. xviii, 219. 8vo.

To any observer of men and things the present literature upon the trust problem contains one of the most interesting groups of modern books. But while we are discussing this problem, the situation itself changes, so that in the case of this book, as of the others, the rule may be repeated that the last account is the most accurate. The question has been discussed from almost every point of view in the various recent books upon the subject, but it may fairly be said that this latest work takes a more general view of the whole question than any of its predecessors. The author discusses both the benefits to be hoped for and the dangers to be anticipated from this great industrial reorganization which has been going on before our eyes. He treats also both the natural remedies to be expected from the economic law and the positive interference to be asked of the law of the land. In all of these matters the author has the point of view of the optimist, not to say of the opportunist. Upon the whole the chief claim of this book to careful reading is its full presentation of the conduct of the present trusts. B. W.

LAW IN DAILY LIFE. A collection of legal questions connected with the ordinary events of every-day life. From the German of Rud. von Jhering with notes and additions by Henry Goudy, Professor of Law in the University of Oxford. Oxford: The Clarendon Press. 1904. pp. xi, 169. 8vo.

As the translator's preface points out, the book is valuable chiefly in suggesting concrete questions by which the legal examiner or teacher can accurately test a student's working knowledge of the general principles of law. That it has gone through twelve editions in the German would seem to show that it has proved its worth for teaching purposes. By omitting questions which bear only on the German Code and adding questions especially applicable to the English common law, the translator has made it equally valuable to the instructor in English law.

THE TRANS-ISTHMIAN CANAL: A study in American diplomatic history (1825–1904). By Charles Henry Huberich, Adjunct Professor of Political Science and Law in the University of Texas. Austin, Texas: 1904. pp. 31. 8vo.

THE JEWS AND THE AMERICAN SUNDAY LAWS. By A. M. Friedenberg. From the publications of the American Jewish Historical Society, No. 11. 1903. pp. 101–115. 4to.

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by William Mack. Vol. XI. New York: The American Law Book Company. 1904. pp. 1197. 4to.